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IN THE

Supreme Court of the United States

No. ——

Supreme Court, U. S.
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JEROME MILLER, Individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Appellants,

vs.

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

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DATE: November 23, 1977.

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JEROME MILLER, Individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Appellants,

vs.

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Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

Appellants Jerome Miller and the Illinois Department of Children and Family Services appeal from the judgment of the United States Court of Appeals for the Seventh Circuit entered September 27, 1977, which affirmed the orders entered by the United States District Court for the Northern District of Illinois on July 27 and August 24, 1976. It is submitted that this Statement demonstrates that the Supreme Court of the United States has jurisdiction of the Appeal and that the federal question presented is substantial.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit entered September 27, 1977 (Appendix B) is not yet reported. The memorandum opinion of the district court rendered July 27, 1976, which is reproduced as an appendix to the decision of the court of appeals, is reported at 431 F. Supp. 40 (N.D. Ill.). The judgment order of the district court entered August 24, 1976 (Appendix C) is not reported. The opinion of the Supreme Court of the United States rendered in this cause on March 31, 1976 (Appendix D) is reported at 425 U.S. 231, 47 L. Ed. 2d 701. The opinion of the three judge district court originally assigned to hear this cause, rendered on February 28, 1974 (Appendix E), is reported at 374 F. Supp. 1204 (N.D. Ill.).

JURISDICTION

Appellees brought a civil rights action alleging jurisdiction under 28 U.S.C. §§ 1343 (3), (4), 2281 and 2284, to enjoin the enforcement of Ill. Rev. Stat., 1971, ch. 23, §§ 2212.05, 2212.17 and 5005 as violative of the United States Constitution and the Social Security Act. On September 27, 1977, the United States Court of Appeals for the Seventh Circuit affirmed the district court's determination that the Illinois statutes violated the Social Security Act

and the supremacy clause of the United States Constitution. On November 3, 1977, appellants filed a notice of appeal in the court of appeals. (Appendix F) The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by 28 U.S.C. § 1254(2). *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 2 L. Ed. 2d 2441 (1958); *Watson* v. *Employers Liability Assurance Corp. Ltd.*, 348 U.S. 66, 99 L. Ed. 74 (1954).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The following Illinois statutes were invalidated by the court of appeals.

Ill. Rev. Stat., 1971, Ch. 23, § 2212.05:

> **2212.05 Facility for child care, defined.]** § 2.05. "Facility for child care" or "child care facility" means any person, group of persons, agency, association or organization, whether established for gain or otherwise, who or which receives or arranges for care or placement of one or more children, unrelated to the operator of the facility, apart from the parents, with or without the transfer of the right of custody in any facility as defined in this Act, established and maintained for the care of children.

Ill. Rev. Stat., 1971, Ch. 23, § 2212.17:

> **2212.17 Foster family home and types of homes, defined.]** § 2.17. "Foster family home" means a facility for child care in residences of families who receive no more than 8 children unrelated to them, unless all the children are of common parentage, for the purpose of providing family care and training for the children on a full-time basis. The family's own children, under 18 years of age, shall be included in determining the maximum number of children served. The term "foster family home" includes homes receiving chil-

dren from any State-operated institution for child care; or from any agency established by a municipality or other political subdivision of the State of Illinois authorized to provide care for children outside their own homes. The types of foster family homes are defined as follows:

(a) "Boarding home" means a foster family home which receives payment for regular full-time care of a child or children.

(b) "Free home" means a foster family home other than an adoptive home which does not receive payments for the care of a child or children.

(c) "Adoptive home" means a foster family home which receives a child or children for the purpose of adopting the child or children.

(d) "Work-wage home" means a foster family home which receives a child or children who pay part or all of their board by rendering some services to the family not prohibited by the Child Labor Law or by standards or regulations of the Department prescribed under this Act. The child or children may receive a wage in connection with the services rendered the foster family.

(e) "Agency-supervised home" means a foster family home under the direct and regular supervision of a licensed child welfare agency, of the Department of Children and Family Services, of a circuit court, or of any other State agency which has authority to place children in child care facilities, and which receives no more than 8 children, unless of common parentage, who are placed and are regularly supervised by one of the specified agencies.

(f) "Independent home" means a foster family home, other than an adoptive home, which receives no more than 4 children, unless of common parentage, directly from parents, or other legally responsible persons, by independent arrangement and which is not subject to direct and regular supervision of a specified agency except as such supervision pertains to licensing by the Department.

Ill. Rev. Stat., 1971, Ch. 23, § 5005, which is reproduced in Appendix A.

The following pertinent provisions are also reproduced in Appendix A:

U.S. Const., Art. VI, § 2;

42 U.S.C. § 601;

42 U.S.C. § 602(a)(20);

42 U.S.C. § 606;

42 U.S.C. § 607(a);

42 U.S.C. § 608;

45 C.F.R. § 233.90(c)(1)(v) (1975).

QUESTION PRESENTED

Whether the Illinois statutory foster care scheme, which provides monetary foster care benefits on behalf of children living only with persons unrelated to them, is consistent with the purpose and meaning of the AFDC foster care program under the Social Security Act, and is therefore consistent with the supremacy clause of the United States Constitution?

STATEMENT OF THE CASE

As part of the federal program for Aid to Families with Dependent Children, the State of Illinois provides federally subsidized foster care payments (AFDC-FC) of up to $105 per month for a dependent child living in a foster family home or child care institution (42 U.S.C. § 608). Under the Illinois Child Care Act, the state will not grant foster care payments to persons who are related to the children for whom they care. Ill. Rev. Stat., 1971, Ch. 23, § 2212.17. Instead persons related to dependent children are eligible to receive payments of $63 per month under the state's basic AFDC program. However, as an exception to its general policy, the State of Illinois will supplement payments to persons caring for related dependent children upon a showing of need, which may bring the total AFDC payments to $105 per child.

Appellees in this case are Marcel and Linda Youakim, husband and wife, and Timothy, Mary Lou, Larry and Sherry Robertson, Linda Youakim's minor brothers and sisters. In 1969, the minor appellees were declared wards of the state, and since that time, Larry and Sherry Robertson have been living at unrelated foster care facilities. Since 1972, the Youakims have provided a home for Timothy and Mary Lou after signing a Relative Home Placement Agreement in which they agreed to provide for these children's physical, mental, emotional and spiritual needs. The Youakims were found ineligible to receive AFDC-FC payments of $105 per month for each child because they are related to Timothy and Mary Lou, but were instead found eligible for assistance under the basic AFDC program.[1]

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1. Since 1974, the Youakims have received supplemental payments for the care of Timothy and Mary Lou, and they now receive monthly payments totaling $105 for each child.

On March 13, 1973, appellees filed a civil rights class action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Illinois against the Illinois Department of Children and Family Services and Jerome Miller, its former director. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1343(3), (4), 2281 and 2284 because the appellees challenged the validity of Illinois statutes. On April 2, 1973, appellants filed their motion to strike and dismiss. In their Second Amended Complaint filed January 21, 1974, appellees alleged that because they could not receive regular AFDC-FC payments at the prevailing $105 rate, appellees could neither provide adequate care for Timothy and Mary Lou, nor consider bringing Larry and Sherry into the Youakim home. Appellees further contended that the Illinois foster care scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it authorizes foster care payments to unrelated foster parents but refuses to allow foster care payments to persons related to the children for whom they care. Appellees asked the court to enjoin appellants from enforcing Ill. Rev. Stat., ch. 23, §§ 2212.05, 2212.17, and the Department's Placement Manual, ch. 5, § 3, as violative of the equal protection clause.

The parties stipulated that appellants' motion to dismiss could stand as to the amended complaint. A three-judge court was convened pursuant to appellees' request, and on February 28, 1974, the three-judge court granted appellants' motion to dismiss. The court specifically found that the Illinois scheme did not violate appellees' right to equal protection.

On April 23, 1974, appellees filed their Notice of Appeal to the United States Supreme Court. In their jurisdictional statement, appellees not only raised their equal protection

challenge, but also claimed that the Illinois foster care scheme is inconsistent with the Social Security Act and, therefore, violates the supremacy clause. The Supreme Court noted probable jurisdiction on March 17, 1975, and on March 31, 1976, the Court vacated and remanded the judgment of the three-judge district court. The Supreme Court stated that the supremacy clause issue was not presented to the three-judge court as a separate ground for decision. In addition, the Court noted that after the filing of appellees' jurisdictional statement but before probable jurisdiction was noted, the Department of Health, Education and Welfare (HEW) issued a "Program Instruction" which stated that the AFDC-FC rate applied "regardless of whether or not the foster care home is operated by a relative." In light of these factors, the Supreme Court felt that the district court should be given an opportunity to rule on appellees' supremacy clause claim.

On remand, appellees filed a motion for preliminary injunction and summary judgment on June 10, 1976 and appellants filed a cross motion for summary judgment on June 14, 1976. On July 27, 1976, the district court, acting through a single judge, granted appellees' motion for summary judgment. The court found that the Illinois foster care statutes, (Ill. Rev. Stat., 1971, ch. 23, §§ 2212.05, 2212.17 and 5005) were repugnant to §§ 401 and 408 of the Social Security Act (42 U.S.C. §§ 601, 608) and to the supremacy clause of the United States Constitution. At the same time, the court found it unnecessary to reach the equal protection issue. On August 24, 1976, the court enjoined appellants from enforcing the Illinois statutes insofar as those statutes excluded persons related to foster children from eligibility under the AFDC-FC program.

In addition to other relief not relevant here, the court ordered appellants to make full AFDC-FC payments to otherwise eligible foster parents who currently have related foster children living with them.

On August 24, 1976, appellants filed their notice of appeal to the seventh circuit from the district court orders. On September 27, 1977, the court of appeals rendered its opinion affirming, with slight modification, the orders entered by the district court.

On November 3, 1977, appellants filed a notice of appeal to this Honorable Court from the decision of the court of appeals (Appendix F).

ARGUMENT

THE ILLINOIS STATUTORY FOSTER CARE SCHEME IS CONSISTENT WITH THE PURPOSE AND MEANING OF THE SOCIAL SECURITY ACT, AND DOES NOT VIOLATE THE SOCIAL SECURITY ACT OR THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION. THE NATIONWIDE RAMIFICATIONS OF THE COURT OF APPEALS' CONTRARY INTERPRETATION REQUIRES PLENARY CONSIDERATION BY THE SUPREMF COURT OF THE UNITED STATES.

Section 408 of the Social Security Act constitutes the federal foster care welfare program (AFDC-FC, 42 U.S.C. § 608). Under the Act, all states participating in the federal Aid to Families with Dependent Children welfare program (AFDC, 42 U.S.C. § 601 *et seq.*) must provide foster care benefits in accordance with § 408 [42 U.S.C. § 602(a)(20)] This case concerns whether Congress, after it initially provided AFDC benefits under § 406 to children living with related persons, intended the subsequently enacted § 408 foster care program to apply only to needy dependent children living with persons unrelated to them. Illinois child care statutes, like the welfare statutes in a number of other states, limit foster care welfare assistance to needy dependent children living with non-related persons. To invalidate the Illinois statutes, the court of appeals had to ignore both the overall purpose and meaning of the federal welfare statute, as well as the legislative history underlying the enactment of the foster care program.

1. Under the plain meaning of the Social Security Act, foster care constitutes only non-related care. The eligibility requirements for participation in the federal foster care

program are set forth in § 408(a). This section describes a "needy dependent child" as one who (a) is removed by court order from the home of a parent or specified relative because continuation there would be contrary to his welfare, (b) is placed under the responsibility of a state or local agency which meets requirements not relevant here, (c) is placed in a foster family home or child care institution, and (d) has been receiving AFDC or was eligible to receive AFDC at the time the court proceedings were initiated or within six months prior to the time judicial proceedings began. As is apparent, § 408(a) does not expressly include or exclude from foster care assistance needy dependent children who are placed with relatives.

Likewise, the definition of a "foster family home" in § 408 does little to clarify whether, for purposes of the Act, the concept of foster care includes related care:

> For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing. (42 U.S.C. § 608)

This definition is ambiguous because the statute uses the phrase "foster family home" to define that term. Hence, it is both necessary and appropriate to examine other sections of the federal welfare scheme in order to determine the meaning and scope of the § 408 foster care program. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713, 44 L. Ed. 2d 525, 532-33 (1975).

Section 406 (42 U.S.C. § 606) is critical to a proper understanding of the federal foster care program, and clearly establishes that § 406 was intended to provide assistance for related care while § 408 was intended to provide assistance

only for unrelated care. Section 406 embodies the basic program for aid to needy families with dependent children. In relevant part, § 406 requires that to qualify for the basic AFDC program, (a) the needy child must be deprived of parental support due to the death, continued absence, or physical or mental incapacity of a parent, and (b) the child must reside with a parent or a specified relative.[2] There is no dispute in this case that appellees have satisfied both criteria, and that they are eligible for assistance under the § 406 basic AFDC program.

In contrast to the basic federal assistance program, § 408 describes a needy dependent child as one who would meet the requirements of § 406 (or § 407), except that he has been removed by judicial order from the home of a § 406 relative and has been placed in a "foster family home" or in a "child-care institution." Needy dependent children who are removed, with or without a court order, from the home of one § 406 relative and placed in the home of another § 406 relative are now, and always have been, entitled to AFDC assistance. *See* 45 C.F.R. § 233(c)(1)(v)(B) Consequently, the more recently enacted § 408 foster care benefits could only have been intended to reach a group of children not previously entitled to federal welfare assistance—that is, needy dependent children who are placed in unrelated homes. The fact that Congress explicitly provided benefits to children living with relatives under § 406 is strong evidence of a congressional intent that removing a child from one relative's home and placing the child in an-

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2. Section 407 expands the basic AFDC program to include a needy child who is deprived of parental support due to the unemployment of his father and who is residing with a parent or specified relative. 42 U.S.C. § 607.

other relative's home is *not* placing the child in a foster family home. See *Burns* v. *Alcala*, 420 U.S. 575, 43 L. Ed. 2d 469, 477, n. 10 (1975).

As recognized in *Burns*, the basic AFDC program covered only those needy children living with parents or specified relatives. A child removed from the home of a parent or relative because of abuse, neglect, or other unsuitable condition, and subsequently placed in the home of a non-related person simply could not obtain aid under § 406. In response to this problem, Congress enacted the § 408 AFDC foster care program so that children who could not live with a parent or specified relative, and who had to live with a non-relative, could nevertheless obtain federal financial assistance. Again, since the § 406 basic AFDC program authorizes aid for children placed with a relative, it is clear that the § 408 foster care program provides benefits only to those needy children not living with relatives. *Burns* implicitly supports this viewpoint:

> The Act now authorizes, in addition to payments for children in the homes of designated relatives, foster care payments for children who have been removed from the homes of relatives. 420 U.S. 575, 582 n. 9, 43 L. Ed. 2d 469, 476.

2. The legislative history of the § 408 foster care program supports the position that foster care means non-related care. As noted, federal benefits have been available to children living in the homes of parents or relatives since the origin of the Social Security Act in 1935. In 1961, however, Congress recognized that even though the objective of the federal welfare program is to provide cash assistance for needy children in their own homes, that is, in the home of a parent or close relative,

> there are some home environments that are clearly contrary to the best interests of these children. . . . Often, however, remedial action on behalf of the child

> was not possible. We believe that this undesirable situation could be avoided, in many instances, if assistance under this program were available for the care of the child in a foster family home when such care is necessary. (S. Rep. No. 165, 87th Cong., 1st Sess. (1961) U.S. Cong. & Adm. News, V. 2, 1721)

In explaining the enactment of the temporary foster care provision, the Senate Committee on Finance stated:

> The foster care provisions in your committee's bill have been designed, insofar as possible, to safeguard the rights of the child and his parents or relatives. No one takes lightly the severance, even for a brief period, of the ties between a child and parent, *or somebody closely related to him. At the same time,* an effort has been made to write into the law provisions which would stimulate and assist the States in the *protection and care of children.* (S. Rep. 165, 87th Cong., 1st Sess. (1961) U.S. Cong. & Adm. News, V. 2, 1722) (emphasis added)

Again, in summarizing the various components of the AFDC program, the Senate Committee noted in 1962 that,

> Prior to present temporary provision which will expire June 30, 1962, no Federal participation was authorized for children in foster care since program was limited to children living in home of a parent or a relative of the degree noted above. (Hearings Before Committee on Finance, U.S. Senate, 87th Cong., 1st Sess., on H.R. 10606, Public Assistance Act of 1962, p. 16).

Commenting on the desirable features of the foster care program, the Senate Committee noted in its 1962 report that the foster care program gave "the States an alternative to leaving the children in unsuitable homes or caring for them elsewhere without Federal participation in the cost." S. Rep. No. 1589, 87th Cong., 2d Sess. (1962) U.S. Cong. & Adm. News, V. 1, 1954. A like sentiment was expressed in the Senate Committee's report on amendments which would expand eligibility under the § 408 program:

> There is some evidence that courts may be reluctant to place a child in foster care because Federal funds are not available (and the cost of the care must come out of local funds in many areas) unless the child is *in the home of a specified relative* [who is receiving AFDC payments on behalf of the child]. The proposed change would make the cost of caring for children in foster care subject to Federal sharing if the child has been placed in foster care by a court order (if the child is removed from the home of a relative as a result of judicial determination that continuation in such home would be contrary to his welfare) and if the child would have been eligible for aid under the AFDC program if an application had been made on his behalf. (S. Rep. No. 744, 90th Cong., 1st Sess. (1967) U.S. Cong. & Adm. News, V. 2, 3001) (emphasis added).

Clearly, if foster care placement was viewed as placement with a relative, the courts would not have hesitated to place a child in foster care, since federal funds would have been available. Instead, the courts' reluctance stemmed from the fact that foster care placement meant placement in unrelated homes, with the consequent loss of federal assistance. In giving the courts a welcome option under the § 408 foster care program, Congress was obviously concerned with the welfare and economic necessities of needy children placed with unrelated persons.

Testimony offered by advocates of the foster care provisions likewise demonstrates that the § 408 foster care program, as popularly understood, provided coverage only for those children living with persons unrelated to them. As noted in the recommendations of the Ad Hoc Committee on Public Welfare appointed to serve the Secretary of Health, Education and Welfare:

> The amendment to title IV which provides payments to children in foster homes is a significant departure

> from the earlier exclusive stress in this program on children living with parents or relatives. Hearings before Committee on Finance, U.S. Senate, 87th Cong., 1st Sess., on H.R. 10606, Public Assistance Act of 1962, p. 83.

Even more significantly, the Welfare Committee of the National Association of County Officials noted:

> In our opinion, a needy child in a foster home is equally as deserving and needy as one of an unemployed parent or one who has a parent *or relative* to reside with, thereby making him eligible for ADC aid. Id. at 344 (emphasis added).

All of the foregoing forcefully demonstrates that the legislative history and plain meaning of the Social Security Act indicate that Congress intended that § 406 provide assistance only for needy children living with specified relatives while § 408 provides assistance only for needy children living with non-relatives.

3. In construing §408 to mean that foster care includes related care, the court of appeals wholly failed to consider both § 406 and the fact that Congress had already provided federal assistance for persons situated like the appellees under the basic AFDC program. The court instead placed exaggerated emphasis on the provision of § 408 that "the term 'foster family home' means a foster family home . . . which is licensed by the State . . . or has been approved . . . as meeting the standards established for such licensing." 42 U.S.C. § 608. The court found that the minor appellees had been placed in foster care in part because, according to the court, the Relative Home Placement Agreement between the instant parties indicates that appellants *approved* the Youakim home for the care of a *foster* child (App. B, 8). This agreement form was originally a Foster Home Placement Agreement. To adapt the form for use in a related care situation, appellants attempted to delete all references to the word "foster" and in some places substitute the word "relative." Of the fourteen references to "foster," appellants failed to strike that word in one place, and obviously such failure resulted from administrative inadvertence. Yet the court relied on this single instance as proof that the Youakim home was approved as a foster home. This determination was made despite the fact that there is no showing in the Record that the Youakims ever met the licensing standards required for approval of the home.

More importantly, the court's undue focus on the licensing or approval requirements under § 408, as well as the court's discussion of the "facts" surrounding the Relative Home Placement Agreement are simply not responsive to the basic question presented here. At issue is whether, for federal welfare purposes, homes maintained by relatives of needy dependent children are to be considered foster family homes. Once this question is answered, § 408 becomes relevant by requiring that such home be licensed by the state as a foster home or approved as meeting the standards for licensing.

4. The practical result of the court's decision is the judicial creation of a special group of beneficiaries like the appellees who are eligible for aid under both § 406 and § 408. By concentrating on the language of only § 408, and by avoiding any discussion of § 406, the court never confronted this very real problem.

Additionally, the court of appeals' interpretation of the foster care provision renders § 408(f) meaningless in circumstances like the present. Under § 408(f), once a child

is removed from the home of a parent or relative, the state must take further remedial measures. Thus, the state foster care plan must:

> (f) include[s] provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed *in the home of a relative* specified in section 606(a) of this title. 42 U.S.C. § 608(f) (emphasis added)

This section clearly indicates that foster care is only temporary care. Foster care must be terminated whenever the child can be returned to the home of his parent or relative with whom he was living or placed in the home of another § 406 relative. If foster care constitutes care provided by relatives, it makes no sense that a child should be removed from the "foster care" of one relative and placed with another relative. Yet, the states are mandated under § 408(f) to remove the child from a foster care placement and must place the child in another relative's home as soon as possible.

While the court of appeals rejected appellants' position respecting § 408(f), the court did not definitively interpret that subsection. Rather, the court could only state that three other interpretations are "plausible." (App. B, 13) In offering one such "plausible" explanation of § 408(f), the court noted that the language of that subsection does not literally prevent payment of foster care benefits to persons related to the children for whom they care. (App. B, 16) Like the court's earlier emphasis on the fact that relatives are not literally excluded from coverage under § 408, this lack of exclusionary language in § 408(f) is

simply not proof that related homes are to be considered foster homes. The seventh circuit's "departure from ordinary principles of statutory interpretation is not supported by [this] Court's prior decisions." *Burns* v. *Alcala*, 420 U.S. 575, 580, 43 L. Ed. 2d 469, 475 (1975).

Furthermore, the adverse impact of the court of appeals' decision on needy dependent children covered by the Act may be far-reaching. Federal assistance is provided under § 406 to encourage relatives to voluntarily care for children who can no longer reside with their parents. By providing foster care aid under § 408 to children living with relatives, such relatives would have no incentive to care for children under the § 406 plan. Because more financial benefits are available under the § 408 foster care program, the court's decision creates a financial incentive for relatives to refrain from caring for needy children until the children have been removed from their homes by court order. This procedure, given its possible traumatizing effects, can never be in the best interests of the child.

5. Other factors likewise show the necessity for plenary consideration by this Honorable Court. After the three-judge court originally empaneled ruled that the Illinois statute did not violate the equal protection clause [*Youakim* v. *Miller*, 374 F. Supp. 1204, 1210 (N.D. Ill. 1974)] appellees filed a Jurisdictional Statement in this Honorable Court raising the same issue present here. After considering the briefs and hearing oral argument, this Court found that the supremacy clause issue was not raised as a separate ground for decision. The Court vacated the original judgment and remanded the cause for consideration of the supremacy clause issue. *Youakim* v. *Miller*, 425 U.S. 231, 237, 47 L. Ed. 2d 701, 707 (1975). This substantial issue has now been aired in the lower court, and it stands ready for review by this Court.

In addition, the instant decision of the court of appeals stands at apparent odds with the decision of the three-judge district court which originally heard this case. Judge Tone,[3] writing for the unanimous district court, stated:

> Far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it. (footnote omitted) The federal statute authorizes aid to the natural parents and relatives of dependent children in one section, 42 U.S.C. § 606, and aid to foster parents in another, 42 U.S.C. § 608. . . . Thus the federal statute makes the same classification as the Illinois statute. *Youakin* v. *Miller,* 374 F. Supp. 1204, 1210 (D. Ill. 1974).

Indeed, this Court recognized in *Youakim* that:

> Had appellants [appellees here] relied on the Supremacy Clause issue as a separate ground for decision it would appear that the claim would have been rejected by the District Court. 425 U.S. 231, 235, 47 L. Ed. 2d 701, 706.

The vacillating position of HEW respecting the scope of the § 408 foster care program further underscores the need for resolution by this Court of the question presented here. Responding to an inquiry by the Illinois Department of Public Aid as to whether § 408 foster care payments could be made to children living with relatives, HEW originally stated in a letter written in 1971 that:

> Federal participation would not be available in such payments. Title IV of the Federal Act distinguishes between AFDC and AFDC Foster Care by providing

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3. Also sitting on the three judge panel were the Honorable John Paul Stevens, formerly of the United States Court of Appeals for the Seventh Circuit and the Honorable Abraham L. Marovitz of the United States District Court for the Northern District of Illinois.

> (1) for assistance in behalf of needy children living with specified relatives and (2) for assistance under specified circumstances on behalf of children removed from the home of a specified relative and placed in a foster family home or child-care institution.

In 1974, HEW adopted an opposite position favoring appellees. (See *Youakim,* 421 U.S. 231, 235, 47 L. Ed. 2d 701, 706). Agency interpretations which conflict with earlier pronouncements rendered closer to the enactment of a particular statute should be given little weight. *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 50 L. Ed. 2d 343, 358-59 (1976). HEW's difficulty in arriving at a consistent interpretation of the § 408 AFDC-FC program provides one more persuasive ground for the plenary consideration of this case.

Finally, while the invalidation of Illinois statutes by the court of appeals is in itself significant, the impact of the decision will be felt far beyond the State of Illinois. Other states have similarly interpreted § 408 as providing foster care benefits only to needy children living with persons unrelated to them.[4] Presumably, the court's decision also effectively invalidates the legislation enacted by those states.

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4. These states include Alabama, Arizona, California, Minnesota, New Mexico and North Carolina.

CONCLUSION

For the foregoing reasons, appellants believe that the instant case presents a substantial federal question which has nationwide importance. Therefore, appellants respectfully urge this Honorable Court to give this case its plenary consideration and to reverse the decision of the court of appeals.

Respectfully submitted,

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APPENDIX A

APPENDIX A

U.S. Const., Art. VI, § 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 601:

> **§ 601. Authorization of appropriations**
>
> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.
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> • • •
>
> Aug. 14, 1935, c. 531, Title IV, § 401, 49 Stat. 627; 1946 Reorg. Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 1, 1956, c. 836, Title III, § 312(a), 70 Stat. 848; July 25, 1962, Pub. L. 87-543, Title I, § 104(a)(4), (c)(2), 76 Stat. 185, 186; Jan. 2, 1968, Pub. L. 90-248, Title II, § 241(b)(1), 81 Stat. 916.

42 U.S.C. § 602 provides in pertinent part:

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must

• • •

(20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 608 of this title:

42 U.S.C. § 606:

§ 606. Definitions

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money

payments or medical care or any type of remedial care recognized under State law to meet the needs of the relatives with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

(e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this

section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary; but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

Aug. 14, 1935, c. 531, Title IV, § 406, 49 Stat. 629; Aug. 10, 1939, c. 666, Title IV, § 403, 53 Stat. 1380; Aug. 28, 1950, c. 809, Title III, Pt. 2, § 323(a), 64 Stat. 551; Aug. 1, 1956, c. 836, Title III, §§ 321, 322, 351(b), 70 Stat. 850, 855; July 25, 1962, Pub. L. 87-543, Title I, §§ 104(a)(3)(D), 108(a), 109, 152, 156(b), 76 Stat. 185, 189, 190, 206, 207; Oct. 13, 1964, Pub. L. 88-641, § 2(a), 78 Stat. 1042; July 30, 1965, Pub. L. 89-97, Title IV, § 409, 79 Stat. 422; Jan. 2, 1968, Pub. L. 90-248, Title II, §§ 201(f), 206(b), 207(a), 241(b)(5), 81 Stat. 880, 893, 916.

42 U.S.C. § 607 provides in pertinent part:

§ 607. Dependent children of unemployed fathers; definition

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

42 U.S.C. § 608:

§ 608. Payment to States for foster home care of dependent children; definitions

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961 from the home of a a relative (specified in such section 606(a) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the month in which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor;

(b) the term "aid to families with dependent children" shall, notwithstanding section 606(b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section—

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or non-profit private child-placement or child-care agency, but subject to limitations prescribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only those items which are included in such term in the case of foster care in the foster family home of an individual.

(c) the number of individuals counted under clause (A) of section 603(a)(1) of this title for any month shall include individuals (not otherwise included under such clause) with respect to whom expenditures were made in such month as aid to families with dependent children in the form of foster care; and

(d) services described in paragraph (f)(2) of this section shall be considered as part of the administration of the State plan for purposes of section 603 (a)(3) of this title; but only with respect to a State whose State plan approved under section 602 of this title—

(e) includes aid for any child described in paragraph (a) of this section, and

(f) includes provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title, and (2) use by the State or local agency administering the State plan, to the maximum extent practicable, in placing such child in a foster family home or child-care institution, of the services of employees, of the State public-welfare agency referred to in section 722(a) of this title (relating to allotments to States for child welfare services under sections 721 to 728 of this title) or of any local agency participating in the administration of the plan referred to in such section, who perform functions in the administration of such plan.

For purposes of this section, the term "foster family home" means foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing; and the term "child-care institution" means a non-profit private child-care institution which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing.

Aug. 14, 1935, c. 531, Title IV, § 408, as added May 8, 1961, Pub. L. 87-31, § 2, 75 Stat. 76, and amended July

25, 1962, Pub. L. 87-543, Title I, §§ 101(b)(2)(D), 104 (a)(3)(F), (G), 131(b), 135(a)-(d), 155(a), 76 Stat. 180, 185, 193, 196, 197, 207; Jan. 2, 1968, Pub. L. 90-248, Title II, §§ 201(e)(4), 205(c), 81 Stat. 880, 892.

Ill. Rev. Stat., 1971, ch. 23, § 5005:

5005. Direct child welfare services.] § 5. To provide direct child welfare services when not available through other public or private child care or program facilities.

For purposes of this Section:

The term "children" means persons found within the State who are under the age of 18 years at the time of acceptance for service or care. The term also includes children under age 18 and children age 18 or more but under age 21 who (1) are in foster care under order of a court and (2) were, at any time before August 1, 1969, recipients of foster care under Sections 6-4 or 12-8.6 of "The Illinois Public Aid Code", approved April 11, 1967, as amended.[1]

The term "child welfare services" means public social services which supplement or substitute for parental care and supervision for the purpose of: (1) preventing or remedying or assisting in the solution of problems which may result in the neglect, abuse or exploitation of children; (2) protecting and caring for homeless, dependent or neglected children; (3) protecting and promoting the welfare of children, including the strengthening of their own families and counseling of family members; (4) providing adequate care of children away from their homes, where needed, in foster family homes or day care or other child care facilities; or (5) providing counseling for mentally retarded, physically, and socially handicapped children and their parents when not otherwise available.

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1. Chapter 23, §§6-4, 12-18.6.

The Department shall establish and maintain tax-supported child welfare services and extend and seek to improve voluntary services throughout the State, to the end that services and care shall be available on an equal basis throughout the State to children requiring such services.

For the purpose of insuring effective state-wide planning, development, and utilization of resources for the day care of children, operated under various auspices, the Department is hereby designated to coordinate all day care activities for children of the State and shall:

(1) Develop a comprehensive day-care plan for the State which identifies high-priority areas and groups, relating them to available resources, and identifying the most effective approaches to the use of existing day care services. The plan shall include methods and procedures for the development of additional day care resources for children to meet the goal of reducing short-run and long-run dependency and to provide necessary enrichment and stimulation to the education of young children. Recommendation shall be made for State policy on optimum use of private and public, local, state and federal resources. A written plan shall be submitted to the Governor, annually, on January 1, and shall include an evaluation of developments over the preceding year, including cost-benefit analyses of various arrangements.

(2) The Department shall conduct day care planning activities within the following priorities:

(a) development of voluntary day care resources wherever possible, with the provision for grants-in-aid only where demonstrated to be useful and necessary as incentives or supports;

(b) emphasis on service to children of recipients of public assistance where such service will allow training or employment of the parent toward achieving the goal of independence;

(c) maximum employment of recipients of public assistance in day care centers and day care homes, operated in conjunction with short-term work training programs;

(d) care of children from families in stress and crises whose members potentially may become, or are in danger of becoming, non-productive and dependent;

(e) expansion of family day care facilities wherever possible;

(f) location of centers in economically depressed neighborhoods, preferably in multi-service centers with cooperation of other agencies;

(g) use of existing facilities free of charge or for reasonable rental wherever possible in lieu of construction.

(3) Based on its planning activities, the Department shall actively stimulate the development of public and private resources at the local level. It shall also seek the fullest utilization of federal funds directly or indirectly available to the Department.

(4) Where appropriate, existing non-governmental agencies or associations shall be involved in planning by the Department.

The Department shall establish rules and regulations concerning its operation of programs established to meet these purposes, including but not limited to adoption, foster care, family counseling, protective services, service to unwed mothers, homemaker service, return of runaway children, and interstate services.

The Department may provide financial assistance, and shall establish rules and regulations concerning such assistance, to persons who adopt physically or mentally handicapped, older and other hard-to-place children who immediately prior to their adoption were legal wards of the Department. The amount of assistance may vary, depending upon the needs of the child and the adoptive parents, but must be less than the monthly cost of care of the child in a foster home. Special purpose grants are allowed where the child requires special service but such costs may not exceed the amounts which similar services would cost the Department if it were to provide or secure them as guardian of the child.

The Department shall accept for care and training any child who has been adjudicated neglected or dependent committed to it pursuant to the "Juvenile Court Act".[2] The Department may, at its discretion except for those children also adjudicated neglected or dependent, accept for care and training any child who has been adjudicated delinquent or as a minor in need of supervision, under the "Juvenile Court Act", but no such child shall be committed to the Department by any court without the approval of the Department.

The Department may assume temporary custody of any child (1) if it has received a written consent to such temporary custody signed by the parents of the child or by the parent having custody of the child if the parents are not living together or by the guardian or custodian of the child if the child is not in the custody of either parent or (2) if the child is found in the State and neither a parent, guardian nor custodian of the child can be located. The Department shall have the authority, responsibilities and duties that a legal custodian of the child would have pursuant to Section 1-12 of the "Juvenile Court Act".[3] A parent,

2. Chapter 37, § 701-1 et seq.
3. Chapter 37, § 701-12.

guardian or custodian of a child in the temporary custody of the Department who would have custody of the child if he were not in the temporary custody of the Department may deliver to the Department a signed request that the Department surrender the temporary custody of the child. The Department may retain temporary custody of the child for 10 days after the receipt of the request, during which period the Department may cause to be filed a petition pursuant to the "Juvenile Court Act". If a petition is so filed, the Department shall retain temporary custody of the child until the court orders otherwise. If a petition is not filed within the 10 day period, the child shall be surrendered to the custody of the requesting parent, guardian or custodian not later than the expiration of the 10 day period, at which time the authority and duties of the Department with respect to the temporary custody of the child shall terminate. The Department may place children under 18 years of age in licensed child care facilities when in the opinion of the Department, such placement would be for their best interest. Payment for board, clothing, care, training and supervision of any child placed in a licensed child care facility may be made by the Department, by the parents or guardians of the estates of those children, or by both the Department and the parents or guardians, except that no payments shall be made by the Department for any child placed in a licensed child care facility for board, clothing, care, training and supervision of such a child that exceed the average per capita cost of maintaining and of caring for a child in institutions for dependent or neglected children operated by the Department. However, such restriction on payments does not apply in cases where children require specialized care and treatment for problems of severe emotional disturbance, physical disability, social adjustment, or any combination thereof and suitable facilities for the placement of such children are not available at payment rates within the limitations set forth in this Section.

The Department may receive and shall use, in its entirety, for the benefit of children any gift, donation or bequest of money or other property which is received on behalf of such children, or any financial benefits to which such children are or may become entitled while under the jurisdiction or care of the Department.

Amended by P.A. 76-2041, § 1, eff. July 1, 1970; P.A. 77-1374, § 1, eff. Aug. 31, 1971.

45 C.F.R. § 233.90(c)(1)(v):

§ 233.90. Factors specific to AFDC

• • •

(c) *Federal financial participation.* (1) Federal financial participation under title IV-A of the Social Security Act in payments with respect to a "dependent child", as defined in section 406(a) of the Act, is available within the following interpretations:

(v) *"Living with [a specified relative] in a place of residence maintained • • • as his • • • own home".* (A) A child may be considered to meet the requirement of living with one of the relatives specified in the Act if his home is with a parent or a person in one of the following groups:

(1) Any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great.

(2) Stepfather, stepmother, stepbrother, and stepsister.

(3) Persons who legally adopt a child or his parent as well as the natural and other legally adopted children of such persons, and other relatives of the adoptive parents in accordance with State law.

(4) Spouses of any persons named in the above groups even after the marriage is terminated by death or divorce.

(B) A home is the family setting maintained or in process of being established, as evidenced by assumption and continuance of responsibility for day to day care of the child by a relative with whom the child is living. A home exists so long as the relative exercises responsibility for the care and control of the child, even though either the child or the relative is temporarily absent from the customary family setting. Within this interpretion, the child is considered to be "living with" his relative even though

(1) He is under the jurisdiction of the court (e.g., receiving probation services or protective supervision); or

(2) Legal custody is held by an agency that does not have physical possession of the child.

APPENDIX B

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1884

MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellees,

v.

JEROME MILLER, individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 635—**Alfred Y. Kirkland,** *Judge.*

ARGUED APRIL 13, 1977—
DECIDED SEPTEMBER 27, 1977

Before CUMMINGS and PELL, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

PELL, *Circuit Judge.* Appellants Jerome Miller and the Department of Children and Family Services (hereinafter referred to collectively as the DCFS) seek reversal of orders of the district court entered on July 27, 1976, and August 24, 1976, determining that related persons caring for children who have been declared wards of the state are eligible for AFDC-FC assistance under § 408 of the Social Security Act, 42 U.S.C. § 608.[1]

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1. 42 U.S.C. § 608 (1970 ed. and Supp. V, 1975), provides:

Effective for the period beginning May 1, 1961—

(a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such

(Footnote continued on following page)

1. *continued*

State plan in or for the month in which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor;

(b) the term "aid to families with dependent children" shall, notwithstanding section 606(b) of this title, include also foster care in behalf of a child described in paragraph (a) of this section—

(1) in the foster family home of any individual, whether the payment therefor is made to such individual or to a public or nonprofit child-placement or child-care agency, or

(2) in a child-care institution, whether the payment therefor is made to such institution or to a public or nonprofit private child-placement or child-care agency, but subject to limitations prescribed by the Secretary with a view to including as "aid to families with dependent children" in the case of such foster care in such institutions only those items which are included in such term in the case of foster care in the foster family home of an individual.

(c) the number of individuals counted under clause (A) of section 603(a)(1) of this title for any month shall include individuals (not otherwise included under such clause) with respect to whom expenditures were made in such month as aid to families with dependent children in the form of foster care; and

(d) services described in paragraph (f)(2) of this section shall be considered as part of the administration of the State plan for purposes of section 603

(Footnote continued on following page)

1. *continued*

(a)(3) of this title;

but only with respect to a State whose State plan approved under section 602 of this title—

(e) includes aid for any child described in paragraph (a) of this section, and

(f) includes provision for (1) development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 606(a) of this title, and (2) use by the State or local agency administering the State plan, to the maximum extent practicable, in placing such a child in a foster family home or child-care institution, of the services of employees, of the State public-welfare agency referred to in section 722(a) of this title (relating to allotments to States for child welfare services under sections 721 to 726 of this title) or of any local agency participating in the administration of the plan referred to in such section, who perform functions in the administration of such plan.

For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing; and the term "child-care institution" means a nonprofit private child-care institution which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing.

The essential and dispositive question concerns the meaning, for federal welfare purposes, of the term "foster family home."

The basic facts regarding the DCFS denial of foster care payments to the Youakims have been recounted in the three-judge district court opinion in *Youakim* v. *Miller*, 374 F. Supp. 1204 (N.D. Ill. 1974), *vacated*, 425 U.S. 231 (1976) (per curiam). Initially, the named plaintiffs filed a civil rights class action against the DCFS charging that the Illinois statutory foster care scheme denied them equal protection under the Fourteenth Amendment. After this claim was rejected by the three-judge court, *see* 374 F. Supp. at 1207-10, the plaintiffs pressed in argument before the Supreme Court the claim that the Illinois state law was in conflict with the Social Security Act. The Supreme Court determined that it was appropriate that the plaintiffs be permitted to press the issue of conflict between state and federal law in the district court, vacated the judgment, and remanded for proceedings consistent with its opinion. 425 U.S. at 236-37.

On remand, the district court reviewed both the history of the case and the contentions of the parties. The opinion of the district court is, with certain exceptions,[2] adopted as the opinion of this court and, the order not having been published, a copy thereof is attached to this opinion as an Appendix. Our independent comments are directed

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2. We also note the district court's references to Sections 601, 603, 606, and 608 of the Social Security Act must be read as referring to the appropriate section numbers of Title 42, United States Code, and not to the Sections of the Act as adopted.

to arguments of the parties which are not set forth or analyzed in the court's memorandum opinion of July 27, 1976 or which arise by virtue of the formulation of the judgment order of August 24, 1976.

I

The district court agreed, as do we, with the Youakims' argument that the plain meaning of the federal statute is that *all* state wards placed in approved foster homes are eligible for full AFDC-FC payments under 42 U.S.C. § 608. The district court further concluded the HEW's Program Instruction APA-PI-75-9, issued on October 25, 1974, was consistent with the plain words and meaning of Section 408 of the Act, 42 U.S.C. § 608. We agree. Finally, the district court concluded after study of the legislative history that Congress did not intend to exclude related foster homes from AFDC-FC benefits authorized in Section 408 of the Act but rather intended such benefits to be paid to eligible children in *all* approved foster homes. We agree that eligible children in approved foster homes are entitled to benefits, but we rest our conclusion on the meaning of the statute itself rather than upon a determination of an implied legislative intent.

The DCFS has consistently maintained that Congress did not intend to benefit children who are *related* to their caretakers as *foster* children living with *foster parents* under the AFDC *foster care* provisions contained in 42 U.S.C. § 608. The essential basis of the DCFS refusal to pay the foster care benefit rate to the Youakims has been its view, succinctly stated before this court, that " a foster family home has to mean a non-related home." One of the strongest arguments in support of the DCFS position is found in a dictionary definition of the adjective "foster." In WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY the general definition is "affording, receiving, or sharing nourishment, upbringing, or parental care though not related by blood or legal ties."[3] The DCFS position is weakened, however, by the examples following the general definition:

a: rearing the child of another

b: brought up by someone other than one's natural parent

c: reared in the same family but not of the same parentage.

Clearly the plaintiffs here are rearing the child of another (a *supra*) and the children involved are being brought up by someone other than their natural parents (b *supra*). In any event, as the DCFS concedes "Congress did not mean to incorporate Webster by reference."

Although the DCFS steadfastly adheres to its contention that the term "related foster parent" is a misnomer for federal welfare purposes, it has admitted that the language of the Social Security Act does not itself exclude relatives from the status of foster parentage.[4] The DCFS

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3. As is the case not infrequently in the English language ambiguities easily emerge. Thus, it might be argued that when persons are designated by a court order to rear a child of someone else, they could not be foster parents because they are related by legal ties. We will assume, however, for the purposes of consideration of the definition quoted above that "related" might narrow the construction to adoptive non-blood parents.

4. At oral argument, the DCFS stated that "[i]t's very true that under the [federal] foster care program the relatives' home is not excluded from coverage under this program—It's not literally excluded." On January 25, 1974, during oral argument before the three-judge

has constructed an elaborate, indeed ingenious argument, regarding an implied legislative intent to exclude relatives from the denotation of the word "foster." However, the DCFS has not directed equal attention to the possibility that our standard of judgment should be the meaning of the statute itself. *See* 2A SUTHERLAND STATUTORY CONSTRUCTION § 45.07, at 20 (1973 ed.)

Our judicial function is limited to applying statutes on the basis of what Congress has written, not what Congress might have written. *See Territory of Guam* v. *Olsen*, —— U.S. ——, —— 45 U.S.L.W. 4469, 4472 (May 23, 1977) (Marshall, J., dissenting). Examination of the various subsections of the Social Security Act discloses that Congress never really attempted to formulate comprehensive definitions of all the terms it employed in the statute. Thus, 42 U.S.C. § 606(b)(2)(D) refers to "aid in the form of foster home care" but does not itself explicate the meaning of the phrase. Similarly, 42 U.S.C. § 608 (b) refers to "foster care in behalf of a child" but again does not explicate the meaning of that phrase.

However, Congress did use the expression "foster family home of any individual," 42 U.S.C. § 608(b)(1). The Youakims read the last three words of the statutory expression as supporting their view, while the DCFS argues that the entire expression must be read in order to

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court, the DCFS similarly admitted that "[t]here is nothing in Federal or State statutes which bars payment to foster parents of related children, that plaintiffs have repeatedly stressed." Of course, these concessions were made in the light of the DCFS reading of an *implied* legislative intent to bar payments under the 42 U.S.C. § 608 program to individuals qualifying under 42 U.S.C. § 606.

discern its real meaning. Forthrightly, the DCFS states that "[t]he question then becomes, what does it mean when Congress has said 'foster family home'?" We agree that this is the appropriate question, but we think that Congress has itself provided the answer by defining that term.

Although Congress has not defined "foster home care," *see* 42 U.S.C. § 606(b)(2)(D), or "foster care," *see* 42 U.S.C. § 608(b), it has in fact set forth a statutory definition of the expression "foster family home":

> For purposes of this section, the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing . . . .

The DCFS submits that this definition is "certainly circular." We need not determine whether or not this geometric criticism is valid, for the statutory phrasing does not appear to be framed with unremitting attention to the demands of lexical science. Our disposition of the appeal should not rest upon the lexicographical expertise of the draftsmen but upon the application of the statute to the facts of the case.

Thus, if the Youakims' home has been approved by the DCFS as meeting the standards established for the licensing of foster care homes, it falls within the statutory definition. The DCFS implicitly concedes that fact in its argument attacking the district court's supposedly erroneous findings.[5] The DCFS argues that the Youakims'

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5. Thus, the DCFS argues that "[t]he conclusion of the district court that the Youakims are foster parents essentially evolve[s] from the court's erroneous findings

(footnote continued on next page)

home *obviously* could not have been approved as a foster care home. The logic of this argument is difficult to discern in view of the formulation of the Relative Home Placement Agreement.

The first sentence of that agreement states that:

> The Division of Child Welfare, Department of Children and Family Services, has approved the home of Mr. and Mrs. Marcel Youakim, address 1720 Mannheim Road, Des Plaines, Ill. for the care of a foster child: Name Timothy Robertson Born 5/1/65.

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that the Youakim home 'has been approved as a foster care home by the State . . . .' " In pressing still further this contention, the DCFS insists that:

> By statute, the State of Illinois *licenses* foster family homes and child-care institutions, in contrast to the equivalent "approval" procedure designated in § 608 which is followed in states which do not license foster care homes. (See Ill. Rev. Stat., 1971, Ch. 3, § 2214.) The Youakim home was not licensed by the State of Illinois, and *obviously it could not have been "approved" as a foster care home.* While it is true that because all children declared to be state wards are the legal responsibility of the state, the Youakim home was initially inspected by state officials to determine that such home was suitable for the placement of the related children, at no time was the home *officially designated as a foster care facility* within the meaning of § 608. Hence, the district court's statement that the Youakim home "has been approved as a foster care home" is erroneous. [Emphasis supplied.]

The last sentence of the agreement states that:

> This placement agreement, made in good faith and mutual confidence, is equally binding on the Department and the ABOVE NAMED RELATIVES.

The plain language of the agreement thus states that the Youakims' home has been approved for the care of a foster child. Under Fed. R. Civ. P. 52(a), findings of fact and conclusions of law are unnecessary on decisions of motions under Fed. R. Civ. P. 56. Because the placement agreement directly refers to the care of a foster child, we agree with the district court's *determination* that the Youakims' home has been approved as a *foster care home.* Whether it is a "foster family home" requires construction of the federal statute.

However, the DCFS argues that there is no showing anywhere in the record that the Youakims have actually met the standards required for the licensing of foster homes, so as to have incurred the identical obligations of all other foster parents in Illinois. In view of the DCFS assertion that this case should be decided on the basis of the clear and literal language which Congress used in enacting 42 U.S.C. §§ 606 and 608, we decline to find merit in the present argument.

We note that 42 U.S.C. § 608 does not require that an approved home actually meet the standards for licensed foster homes. Instead, the statutory language states that the home must be approved by the state agency as meeting the standards for licensing. The suggestion that the Youakims obviously could not be approved, *see* note 5 *supra,* is juxtaposed with the assertion that Illinois is a licensing state. However, the DCFS has already admitted

in this case that the Youakims could not obtain a license.[6] Moreover, the DCFS Family Services Family Placement Manual states not only that "related" persons are not subject to foster home licensing but also that a relative home must reasonably meet minimum standards if it is to be considered as a placement resource.

We do not understand the DCFS to be contending that its staff workers ignored the criteria established in the Placement Manual. That the home of the Youakims was not "officially designated as a foster care facility," *see* note 5 *supra*, stems entirely from the want of power under Illinois law to make such an official designation. The very statutory provision struck down in the lower court's judgment order defines a "foster family home" as a facility for child care in the residences of families who receive children *unrelated* to them. Ill. Rev. Stat. 1975, ch. 23, § 2212.17. The DCFS can hardly rely upon a definition of "foster family home" which directly conflicts with the federal statutory definition as a way of upsetting the district court's determination of a violation of the Supremacy Clause. Nor can the DCFS procedure of

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6. At oral argument before the three-judge court, the DCFS explained that relatives were not subject to the licensing requirement. "[T]he State in its wisdom regards foster care on the part of relatives to be of a much more personal nature [than is the case with persons unrelated to the children for whom they provide foster parent care], and in its desire to secure family unity excludes relatives from the requirements of obtaining a license before placement is made with them."

striking out the word "foster" wherever it appears in a Foster Home Placement Agreement be determinative of the Youakims' right to foster care benefits.[7]

The DCFS argues that the formulation of § 608(f), *see* note 1 *supra*, makes no sense whatsoever if related persons like the Youakims are held to be eligible for foster care payments. The DCFS contends that the only reasonable conclusion to be drawn from the Congressional insistence that the state plan should be designed to make possible the placement of the child in the home of a relative specified in § 606(a) is that Congress could not have intended to extend foster care coverage to a group of persons (*viz.*, relatives caring for needy children) who were already covered by § 606 or to needy dependent children who are living with relatives. The DCFS interprets § 608(f) as meaning that, rather than regarding the Youakim home as a permanent stable environment for the Youakims' related children, it would paradoxically be required under the subsection to strive to remove the children from such temporary foster care and place them elsewhere.

We think that the DCFS reading of 42 U.S.C. § 608(f) is incorrect. That particular provision appears in a long, convoluted passage which begins with subsection (c) and continues up to the defining passage. *See* note 1 *supra*. Only three readings of the subsection are plausible.

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7. As the text of the executed agreement itself makes clear, the DCFS attempt to strike out "foster" in all instances was not successfully executed. Because the DCFS approved the home for the care of a foster child, it ill serves their case to argue now that the Youakims have persistently begged the essential question in this appeal by insisting that they are foster parents.

First, the passage may refer back to subsection (c). In that case, it sets forth a condition which must be met before individuals receiving foster care expenditures are to be counted under § 603(a)(1)(A).[8] That referenced

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8. 42 U.S.C. § 603(a)(1)(A) (1970 ed. and Supp. V, 1975), provides:

> (a) From the sums appropriated therefor, the Secretary of the Treasury shall pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—
>
> (1) in the case of any State other than Puerto Rico, the Virgin Islands, and Guam, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as aid to families with dependent children under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter for individuals who are recipients of money payments under such plan and other insurance premiums for medical or any other type of remedial care or the cost thereof)—
>
> (A) five-sixths of such expenditures, not counting so much of any expenditure with respect to any month as exceeds the product of $18 multiplied by the total number of recipients of aid to families with dependent children for such month (which total number, for purposes of this subsection, means (i) the number of individuals with respect to whom such aid in the form of money payments is paid for such month, plus (ii) the number of other individuals with respect to whom expenditures were made in such month as aid to families with dependent children in the form of medical or any other type of remedial care, plus (iii) the number of individuals, not counted under clause (i) or (ii), with respect to whom payments

subsection specifies in part the amount which the Secretary of the Treasury shall pay in the case of a State by authorizing five-sixths of certain expenditures, not counting for purposes of *that subsection* a certain number of individuals. Second, the provision may refer back to subsection (d). In that case, the provision has significance for purposes of the reimbursement of administrative expenditures as provided in § 603(a)(3).[9] Either reading of subsection (f) respects the syntactic construction of the statute and gives some meaning to the Congressional usage of punctuation.

Third, by attaching greater significance to legislative margination than to punctuation or syntax, § 608(f) may be read as qualifying the legislative determination to make foster care benefits available to needy dependent

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9. 42 U.S.C. § 603(a)(3) (1970 ed. and Supp. V, 1975), in pertinent part, provides:

> (a) From the sums appropriated therefor, the Secretary of the Treasury shall pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—
>
> (3) in the case of any State, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as found necessary by the Secretary of Health, Education, and Welfare for the proper and efficient administration of the State plan—

> described in section 606(b)(2) of this title are made in such month and included as expenditures for purposes of this paragraph or paragraph (2)); plus . . . .

children. In that case, the provisions of the foster care program embodied in subsections (a) to (d) are effective only under certain conditions. The "but only" clause of the section which immediately precedes subsections (e) and (f) thus encompasses all of the preceding statutory material. Assuming but without deciding that such is the case, subsection (f) still cannot be tortured into meaning that a state is required to remove children from the care of approved related persons. The very terms of the subsection merely provide that the agency plan for children assure that services are provided which are designed to improve the conditions of the home from which they were removed or to otherwise make it possible to place them in the home of a specified relative. *See* note 1 *supra*. A plan for any child which promoted the former objective would suffice. Thus, as the DCFS has earlier conceded, there is nothing in the language of § 608(f) which prevents payment of foster care benefits to related foster parents.

Moreover, were this court to attach greater significance to margination than to punctuation, it would inexorably be drawn back again to the defining passage. That portion of the statutory section is marginated in such a fashion as to place it on an equal footing with the effectuating clause and the "but only" qualification. Because the defining passage controls the entire section, not merely discrete subsections thereof, its plain language must control.

We conclude that neither the DCFS reliance on the ordinary meaning of the word "foster" nor its interpretation of the planning requirements embodied in § 608(f) can justify deviation from the statutory definition of a "foster family home." Thus we rule that the district court's grant of summary judgment on July 27, 1976 in favor of the Youakims was legally correct.

II

The DCFS submits that this court should reverse the judgment order of August 24, 1976, even if it concludes that the summary judgment order was proper. The DCFS contends that the implementing order is overly broad, misleading, and contrary to the Social Security Act itself. In particular, the DCFS notes that the lower court ignored the § 608(a)(4) requirement that the foster child must either have been receiving AFDC or have been eligible to receive AFDC assistance had application been made within six months prior to the initiation of court action leading to a determination of wardship. *See* note 1 *supra*. The Youakims concede the possibility of ambiguity in the judgment order, but indicate that the foster children have no objection to an amendment to the order which would include reference to the 42 U.S.C. § 608(a)(4) requirement of an AFDC eligible home.

We agree that the judgment order, if read in its entirety, correctly and properly indicates the required scope of relief. However, in order to remove any possible misinterpretation that the § 608(a)(4) requirement need not be met in order to qualify for AFDC-FC benefits, we modify Paragraph 2 of the August 24, 1976, order.[10]

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10. The paragraph as modified will thus read:

2. 42 U.S.C. §§ 601 and 608 require that whenever a child has been or is removed from the home of a relative specified in 42 U.S.C. § 606(a) as the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and his placement and care are the responsibility of defendants, and such child is placed by defendants in an approved foster home maintained by relatives of

The DCFS further argues that the portion of the judgment order requiring it to promulgate new rules and regulations consistent with the court's order is an unwarranted intrusion into the internal affairs of the state and beyond the jurisdiction of the court.

We are satisfied that the district court had equitable power to order the promulgation of new rules and regulations. Although this case differs somewhat from *Mandley* v. *Trainor*, 545 F. 2d 1062 (7th Cir. 1976) (*Mandley II*), *cert. granted sub nom. Quern* v. *Mandley*, —— U.S. ——, 45 U.S.L.W. 3790 (June 6, 1977), the dissimilarity is not sufficient to require modification of the district court's order.

In *Mandley II*, *supra* at 1072, we recognized that the Secretary of HEW had a mandatory duty under 42 U.S.C. § 1302 to promulgate regulations implementing the provisions of the Social Security Act. In that case,

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the child, and such child received aid under the State plan approved under section 602 of Title 42 in or for the month in which court proceedings leading to such determination were initiated or would have received such aid in or for such month if application had been made therefor or, in the case of a child who had been living with a relative specified in § 606(a) within six months prior to the month in which such proceedings were initiated would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefor, such child and those relatives shall be eligible for full AFDC-FC payments and ancillary benefits to the same extent as a child placed in a foster home maintained by foster parents not related to the child, and such parents.

we did decline to "order HEW specifically to include any items in its new regulation." *Id.* at 1073. Nonetheless, we rejected the notion implicit in HEW's objection that ordering the promulgation of regulations was an untoward invasion of the province of the Secretary. *Id.* at 1072. Here also, the DCFS is mandated by state law to establish rules and regulations concerning its operation of programs for foster care. *See* Ill. Rev. Stat. 1975, ch. 23, § 5005.[11] Moreover, the district court's order in this case, by its very terms, does not direct the DCFS to adopt any particular rule or regulation. Instead, Paragraph 7 of the order carefully uses such words as "policies and procedures." It requires modification of existing provisions only insofar as

> existing policies and procedures presently exclude from eligibility or deny full AFDC-F[C] foster care payments and ancillary benefits to otherwise eligible foster children and foster parents related to them, because such foster children are living in foster homes maintained by such foster parents, and/or which are otherwise inconsistent with or frustrate the statutory policy of Title IV of the Social Security Act, 42 U.S.C. § 601 *et seq.*, favoring placement of such foster children in the homes of relatives.

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11. The DCFS contends that, under Ill. Rev. Stat. 1975, ch. 23, § 5004, the Department has been given discretionary authority to promulgate rules and regulations consistent with law. We regard as disingenuous the DCFS omission of the plain language in § 5005 which *mandates* the establishment of rules and regulations.

Thus, there is no requirement that specific items be included in a promulgated regulation. The only proper reading of the judgment order is that it requires the DCFS to formulate its regulations consistent with the demands of federal statutory law. Acceptance of the DCFS argument would strip the federal courts of jurisdiction and power to enforce rights under 42 U.S.C. § 1983. The DCFS reliance on *Rizzo* v. *Goode*, 423 U.S. 362 (1976), is misplaced. Although the federal courts must be constantly mindful of the adjustment to be preserved between federal equitable power and State administration of its own law, they must, and do, retain power to enforce compliance with federal statutes.

For the reasons hereinbefore stated, the orders appealed from are affirmed as modified.

AFFIRMED.

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 635

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs,

v.

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES, and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on remand from the United States Supreme Court for consideration of plaintiffs' claim that the statutory scheme of the Illinois foster care program, specifically Illinois Revised Statutes ch. 23, §§ 2212.05, 2212.17, and 5005, is in conflict with Title IV of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*

This suit was commenced as a class action to enjoin the operation of the Illinois foster care payment scheme. Because the plaintiffs sought to enjoin the operation of a scheme established by state statute, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284. Under the Illinois scheme foster parents who provide homes for *unrelated* children receive monthly foster care payments (AFDC-FC) of $105.00 per child from the Department of Children and Family Services, while foster parents who provide homes for *related* children do not receive such payments. Related foster parents, instead, are eligible for smaller AFDC payments from the Illinois Department of Public Aid.

The three-judge court granted summary judgment in favor of defendants, finding that the Illinois scheme "does not deny plaintiffs the equal protection of the laws." 374 F. Supp. 1204, 1210 (N.D. Ill. 1974). The Supreme Court, in vacating the three-judge court judgment and remanding, noted that "the circumstances justify . . . our dealing with the issue of conflict between state and federal statute at least to the extent of vacating the judgment below and remanding the case for consideration of the claim that the Illinois foster care program is in conflict with the Social Security Act." *Youakim* v. *Miller*, —— U.S. ——, 96 S. Ct. 1399, 1401 (1976).

STATEMENT OF FACTS

Plaintiffs are Marcel and Linda Youakim, husband and wife, and Linda's four minor brothers and sisters. All four minors were adjudged wards of the State in 1969. Two of the children have been living with their related foster parents, the Youakims since 1972; the other two children have been living in two separate unrelated foster care facilities since 1969. Because plaintiff Linda Youakim is related to her two foster children, the Youakims are ineligible for foster care payments (AFDC-FC) under the Illinois Child Care Act. Illinois Revised Statutes ch. 23, 2212.17.[1] The Youakims did apply for and are receiving the smaller AFDC payments for both children. Illinois Revised Statutes ch. 23, §§ 4-1 *et seq.*[2]

Plaintiffs allege injury resulting in the financial inability to provide adequate care for their foster children and to bring the remaining two children into their foster home. Plaintiffs argue that the Illinois scheme violates the Supremacy Clause of the United States Constitution. The Youakims also contend that the Illinois scheme denies related foster families equal protection of the laws

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1. This section provides in pertinent part: "Foster family home" means a facility for child care in residences of families who receive no more than [eight] children *unrelated* to them . . . for the purpose of providing family care and training for the children on a full-time basis. (emphasis added)

2. Although foster parents caring for related children are eligible for Aid to Families with Dependent Children ("AFDC") payments under the statute, they must make a separate application to the Department of Public Aid for the average $63.00 per month per child.

by discriminating against wards of the State and their relatives who are financially unable to provide foster homes for the wards without full foster care payments.

On remand from the Supreme Court, plaintiffs ask this Court to enjoin enforcement of the State statutes involved pursuant to Rule 65(a), Federal Rules of Civil Procedure, or in the alternative, to grant summary judgment against defendants pursuant to Rule 56, Federal Rules of Civil Procedure. Defendants ask that this Court deny plaintiffs' motion for a preliminary injunction and grant summary judgment in their favor.

THE PARTIES' ARGUMENTS

Plaintiffs contend that Illinois attempts to add an additional eligibility requirement to the federal scheme regulating AFDC-FC foster care payments. In support of their position, plaintiffs note that in the Social Security Act (the "Act"), Section 601 [Section 401 of the Social Security Act] evidences a clear national policy favoring placement of dependent children in their own homes or the homes of certain close relatives,[3] while Section 608 [408] provides that federal funds are to be paid for the foster care of dependent children in the home of *any* individual. Section 608 [408] defines the foster family home of any individual as:

> [A] foster family home for children which is licensed by the state in which it is situated or has been approved, by the agency of such state responsible for licensing homes of this type as meeting the standards established for such licensing . . . .

Plaintiffs allege that in contrast to the federal scheme, the Illinois scheme requiring that foster parents be unrelated pulls families apart by prohibiting receipt of AFDC-FC payments by related foster parents. Section 5 of the Department of Children and Family Services Act, Illinois Revised Statutes ch. 23, § 5005, empowers the Department and its Director to establish rules and regulations concerning foster care, while the other challenged sections provide in pertinent part:

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3. Linda Youakim, as sister of the minor plaintiffs, is such a close relative under § 606(a)(1) [§ 406(a)(1)] of the Act.

> "Facility for child care" or "child care facility" means any person . . . who or which receives or arranges for care or placement of one or more children *unrelated* to the operator of the facility. Illinois Revised Statutes ch. 23, §§ 2212.05, 2212.17. (emphasis added)

The plaintiffs note further that while Illinois Revised Statutes ch. 23, § 4-1.2 provides for foster care payment, the *Illinois Department of Children and Family Services Placement Manual* states that "[t]he Department has no statutory authority to pay relatives for the care of children." *Manual* at 97.

Defendants argue, conversely, that the Illinois foster care program parallels the federal scheme since parents and close relatives are treated separately from foster parents. Defendants note that Sections 601-606 [401-406] of the Act provide for aid to needy children living with their parents or certain close relatives (AFDC), while Section 608 [408] provides aid to children removed by court order from the homes of parents or close relatives and placed in foster care facilities (AFDC-FC). They argue Illinois, likewise, provides aid for children living with their parents or close relatives under the AFDC program, Illinois Revised Statutes ch. 23, §§ 4-1 to 4-11, and aid to children living with unrelated foster parents under the AFDC-FC program, Illinois Revised Statutes, ch. 23, § 4-1.2. Defendants note that Section 603(a)(1)(B) [403(a)(1)(B)] of the Act, as construed by the court in *Ramos* v. *Montgomery,* 313 F. Supp. 1179 (S.D. Cal. 1970), *aff'd,* 400 U.S. 1003 (1971), authorizes higher payments to recipients of AFDC-FC benefits than to AFDC recipients. Finally, defendants argue that the two categories, parents and relatives of needy children and foster

parents, are mutually exclusive under a correct interpretation of the Department of Health, Education and Welfare ("HEW") regulations contained in 45 C.F.R. § 233.90 (1975).

CONCLUSIONS

The Constitution and the laws of the United States are the supreme law of the land. *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819). Because of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, states may not enact laws or regulations which are contrary to federal law. If the challenged Illinois statutes are in conflict with Article IV of the Social Security Act, such statutes are invalid under the Supremacy Clause. *King* v. *Smith,* 392 U.S. 309 (1968); *Lewis* v. *Martin,* 397 U.S. 552 (1970); *Townsend* v. *Swank,* 404 U.S. 282 (1971); *Carleson* v. *Remillard,* 406 U.S. 598 (1972); *Van Lare* v. *Hurley,* 421 U.S. 338 (1975); and *Philbrook* v. *Glodgett,* 421 U.S. 707 (1975.)

As the basic question is one of statutory construction, this Court looks to three sources to determine whether the Illinois scheme violates the provisions of Title IV of the Act: (1) the plain words and meaning of the Act; (2) the interpretation and advice of the administering agency, HEW; and (3) the legislative history and the overall purpose of the Act.

1. PLAIN MEANING OF THE SOCIAL SECURITY ACT

Plaintiffs argue that the plain meaning of the Act is that all wards of the state placed in approved foster homes are eligible for full AFDC-FC payments under Section 608 [408]. In contrast, defendants contend that

the plain meaning of the Act indicates that Congress intended to provide assistance to needy children living with close relatives through the AFDC program under Section 606 [406] of the Act rather than through the Section 608 [408] foster care program. This Court agrees with plaintiffs[']contention.

The four minor plaintiffs were removed from their own home and declared wards of the State in 1969. While all four lived in unrelated foster care facilities, those facilities received the full $105.00 per child per month AFDC-FC allotment. In order to effectuate the policy that wards of the State be placed in the best home possible, two of the four children were moved to a related home in 1972 and AFDC-FC payments on behalf of those children were terminated.

Plaintiffs Youakims' home has been approved as a foster care home by the State as required by Section 608 [408] of the Act.[4] The Youakims were required to sign the same Illinois Foster Home Placement Agreement[5] and incurred identical obligations as all other foster parents in Illinois.

This Court finds, therefore, that under the plain words and meaning of Section 608 [408] of the Act, the four minor plaintiffs meet all the requirements for eligibility and the Youakims are an approved foster home.

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4. Illinois *licenses* unrelated foster homes and *approves* homes of related individuals taking in wards of the State. Approved homes, however, must meet the same high standards as licensed homes and must submit to regular inspections and reports by employees of the Department of Children and Family Services.

5. In the Youakims' Agreement, however, the word *foster* and the sections providing for AFDC-FC payments were deleted.

2. ADVICE OF THE ADMINISTERING AGENCY

The Supreme Court, in remanding this case, noted that "[t]he interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute." (citations omitted) The plaintiffs note that the Solicitor General of the United States, arguing on behalf of HEW in an amicus memorandum filed with the Supreme Court, submitted:

> [T]hat the Illinois policy of denying foster care AFDC [AFDC-FC] benefits for children living with relatives is invalid because it conflicts with specific criteria for eligibility set forth in the Social Security Act . . . .
> Those conditions were satisfied here, and the [children are] therefore entitled to foster care benefits. (Amicus Memorandum at 2, 5)

Plaintiffs further submit that HEW has issued a "Program Instruction"[6] to *all* state welfare agencies which requires full AFDC-FC payments to children living in approved related foster homes.

Defendants urge this Court to reject these new HEW guidelines as inconsistent with the federal statute. However, this Court finds the guidelines to be consistent with the plain words and meaning of Section 608 [408] of the Act.

This Court believes these guidelines are persuasive authority in support of plaintiffs' position.

3. LEGISLATIVE HISTORY OF THE SOCIAL SECURITY ACT

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6. Program instruction APA-PI-75-9 was issued on October 25, 1974. The Supreme Court considered the issuance of this directive as one reason for vacating the lower court's judgment and remanding this case.

The legislative history of Title IV of the Act indicates that its overall purpose is to insure the best possible care for all dependent children. Originally Title IV only covered needy children living with parents or designated relatives, and Title V covered foster children. In 1961 aid to foster children was brought under Title IV when Congress created AFDC-FC assistance. In authorizing the new foster care program, Congress noted that states would have the option of dispersing federal funds to children who had been adjudicated wards of the state and who were in need of foster homes.[7]

Plaintiffs contend that the complete legislative history of the Act supports the position that Congress intended every eligible child placed in an approved foster home to receive AFDC-FC benefits. Defendants respond that the legislative history shows Congress intended a continuing distinction between foster care and related care despite the fact that both programs were brought under one title in 1961.

After studying the relevant legislative history this Court believes Congress did not intend to exclude related foster homes from AFDC-FC benefits authorized in Section 608 [408] of the Act. Rather, Congress intended such benefits to be paid to eligible children in *all* approved foster homes.

This Court concludes therefore that Title IV of the Social Security Act authorizes AFDC-FC payments to all eligible children living in state-approved foster homes. The only requirements set forth in Section 608 of the Act are that such children be: (1) adjudicated wards of the

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7. *See* Sen. Rep. No. 168, 87th Cong. 1st Sess., 1961 U.S. Cong. & Adm. News V.2 at 1717.

state; (2) removed from their own homes; and (3) in need of assistance. Illinois, by refusing AFDC-FC payments to all related foster parents, attempts to add a further requirement of eligibility for such payments. The Illinois scheme, Illinois Revised Statutes ch. 23, §§ 2212.05, 2212.17 and 5005, insofar as it denies eligibility to foster parents providing homes for children related to them, violates Title IV of the Social Security Act, §§ 601, 608 [§§ 401, 408] and the Supremacy Clause of the United States Constitution, Article VI, Clause 2. The challenged statutes therefore must fall. *King* v. *Smith, supra; Townsend* v. *Swank, supra; Carleson* v. *Remillard, supra; Van Lare* v. *Hurley, supra;* and *Philbrook* v. *Glodgett, supra.*

Accordingly, plaintiffs' motion for summary judgment is granted. Since plaintiffs have prevailed on the statutory issue, it is unnecessary for this Court to reach the equal protection issue.

ENTER: /s/ ALFRED Y. KIRKLAND, *Judge*

DATED: July 27, 1976

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

APPENDIX C

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARCEL YOUAKIM and LINDA YOUAKIM, et al.,
Plaintiffs,
v.
JEROME MILLER, et al.,
Defendants.
No. 73 C 635

JUDGMENT AND ORDER

This matter coming on to be heard pursuant to the Memorandum Decision and Judgment of the Three Judge District Court, 374 F. Supp. 1204 (N.D. Ill. 1974), the judgment of the United States Supreme Court vacating the prior three-judge court judgment and remanding, —— U.S. ——, 96 S. Ct. 1399 (1976), and this Court's Memorandum Opinion and order dated July 27, 1976, and the Court having determined that the several provisions of this Decree are necessary to afford the plaintiffs and members of the plaintiff class the full equitable relief to which they are entitled:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. Ill. Rev. Stat. ch. 23 §§ 2212.05, 2212.17 and implementing policies and procedures of the Illinois Department of Children and Family Services ("DCFS") are contrary to 42 U.S.C. §§ 601 and 608, implementing federal regulations, and Department of Health, Education and Welfare Program Instruction API-PI-75-9 and are there-

fore invalid under the Supremacy Clause of the United States Constitution, Article VI. cl. 2 insofar as they exclude from eligibility, or deny full Aid to Families with Dependent Children-Foster Care payments (hereinafter, "full AFDC-F payments") under 42 U.S.C. § 608, or ancillary public assistance benefits and services under Titles IV, XIX and XX of the Social Security Act and the Food Stamp Act of 1964 (hereinafter "ancillary benefits"), to:

(a) defendent foster children otherwise eligible for these full AFDC-F payments and ancillary benefits, because such children live in foster family homes or child care institutions (hereinafter, "foster homes") maintained by foster parents or other persons (hereinafter, "foster parents") who are related to them;

(b) foster parents otherwise eligible for these full AFDC-F payments and ancillary benefits, because such parents maintain foster homes for foster children related to them.

2. 42 U.S.C. §§ 601 and 608 require that whenever a child has been or is removed from the home of a relative specified in 42 U.S.C. § 606(a) as the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and his placement and care are the responsibility of defendants, and such child is placed by defendants in a licensed or approved foster home maintained by relatives of the child, such child and those relatives shall be eligible for full AFDC-F payments and ancillary benefits to the same extent as a child placed in a foster home maintained by foster parents not related to the child, and such parents.

3. The plaintiff class in this case, pursuant to F.R.C.P. 23(a) and (b)(2) consists of:

(a) all persons eligible for AFDC-F payments and ancillary benefits, but who have been or are being denied such payments or benefits, in whole or in part, by defendants because they maintain foster homes for wards of the state (foster children) related to them.

(b) all wards of the state (foster children) eligible for AFDC-F payments and ancillary benefits, who have been or are being denied such payments or benefits, in whole or in part, by defendants because they are living in foster homes maintained by foster parents related to them.

(c) all wards of the state (foster children) not living with their relatives because such relatives have been unable to accept them as foster children without the full AFDC-F payments and ancillary benefits provided to foster families in which foster parents are unrelated to the foster children, and such relatives.

4. Defendants, their agents, employees and all other persons in active concert with them are enjoined from:

(a) enforcing Ill. Rev. Stat. ch. 23, §§ 2212.05, 2212.17, and 5005, and all implementing administrative policies and procedures, insofar as they exclude from eligibility, or deny full AFDC-F payments or ancillary benefits to, foster children living in foster homes maintained by related foster parents, and to these related foster parents, when such children and such parents are otherwise eligible for such payments and benefits;

(b) failing to pay full AFDC-F payments to foster children living in foster homes maintained by related foster parents, and to these related foster parents which such children and parents are otherwise eligible for such payments;

(c) failing to provide, or assist in providing, ancillary benefits to foster children living in foster homes maintained by related foster parents, and to these related foster parents, when such children and parents are otherwise eligible for such payments (to the same extent as defendants provide, or assist in providing, benefits to foster children living in foster homes maintained by unrelated foster parents, and to these unrelated foster parents).

5. Defendants shall make the first cash payment of full AFDC-F payments on or before October 1, 1976, to foster parents who currently have related foster children living with them. Such first payment shall be for the period July 27, 1976, to October 1, 1976, and for each such foster parent so paid such first payment, shall not be less (when added to other Aid to Families with Dependent Children payments for this period) than the amount of AFDC-F payments which would have been paid to each such parent had each been maintaining a foster home for unrelated foster children for this period.

6. On or before October 1, 1976, defendants shall, by the notice attached hereto as Exhibit A, inform all foster parents with whom related foster children are currently living, of the provisions of this Order, of their eligibility for full AFDC-F payments and ancillary benefits, and of the reason for the issuance of the first benefit payment described in paragraph 5.

7. Within forty (40) days from the date of the entry of this Order, defendants shall submit to the Court, for approval, policies and procedures issued pursuant to and implement this Order, amending existing provisions insofar as existing policies and procedures presently exclude from eligibility or deny full AFDC-F foster care pay-

ments and ancillary benefits to otherwise eligible foster children and foster parents related to them, because such foster children are living in foster homes maintained by such foster parents, and/or which are otherwise inconsistent with or frustrate the statutory policy of Title IV of the Social Security Act, 42 U.S.C. § 601 *et seq.*, favoring placement of such foster children in the homes of relatives. The policies and procedures which shall be modified and amended include, but are not limited to:

(a) DCFS regulations, including Regulation No. 5.12 (*Minimum Standards for Licensed Foster Family Homes*);

(b) DCFS Policies and Procedures Manual provisions, including Policy and Procedure §§ 2.14 (*Principles and Policies for Child Placement*), 2.16 (*Essential Elements in Foster Care*), 2.1.12 (*Selection of Foster Care Resource*), 2.21 (*Utilization of Foster Family Homes - Definition*);

(c) Placement Agreement Forms utilized in foster care placements;

(d) Purchase of Service Agreements, data record policies, memoranda, staff instructions, forms, computer programs, and other policies and procedures, if change therein is necessary to fully comply with and effectuate any provision of this Order.

Not less than ten (10) days prior to the date defendants submit to the Court for approval such policies and procedures, defendants shall serve upon the attorneys for plaintiffs a copy of said policies and procedures. After the Court approves such policies and procedures, including the amendments to existing provisions, defendants shall cause such policies and procedures to be promptly promulgated and effectuated.

8. Defendants shall take all necessary action, including but not limited to that described in subparagraphs (a), (b), and (c) hereof, to identify relatives capable of providing foster homes for defendants' wards currently residing in child care institutions or foster family homes maintained by unrelated persons. In any case where such a relative is willing to provide a foster home for the related child, placement and/or transfer decisions for the related foster child shall continue to be made under defendants' policies and procedures, as amended pursuant to this Order, and in the best interests of the child, but with due regard to the statutory policy, 42 U.S.C. § 601 *et seq.*, favoring placement of such a child in the home of a relative.

(a) For foster children not currently residing with relatives, defendants shall identify relatives from defendants' case files (and in the absence of sufficient information in the case files, by questioning the foster children and the relatives from whose home the child was removed). Defendants shall send to all such identified relatives the notice attached hereto as Exhibit B, by November 15, 1976.

(b) Whenever defendants shall receive a response from such relatives indicating that they are or may be willing to provide foster homes for foster children related to them, defendants shall take all action necessary to approve or disapprove the relatives' home and arrange placement or transfer, when appropriate, within two months after receiving such a response.

(c) Relatives who request that, and/or apply to have their home licensed or approved as a foster home, or who request and/or apply for the placement or transfer of a related foster child in or to their home, shall have the rights of hearing

and appeal provided pursuant to DCFS Regulation Nos. 2.18 and 5.02 in any case in which such requests or applications are denied or not acted upon promptly. In any case in which such an application or request is denied, the relative shall be entitled, when the denial is made, to notice of the reasons for such denial, and the reasons for such denial shall also be entered in the foster child's case record.

9. Defendants shall henceforth consider all placements and transfers of foster children and make all regular periodic evaluations of existing placements of foster children under defendants' policy and procedures, as amended pursuant to this Order, and in the best interests of the child, but with due regard to the statutory policy, 42 U.S.C. § 601 *et seq.*, favoring placement of such a child in the home of relatives.

10. Within ten (10) days from the entry of this Order, defendants shall cause to be directed to each DCFS administrator, caseworker, and other employee having responsibilities related to the AFDC-F program, a copy of this Order together with a notice stating that all DCFS policies and procedures inconsistent therewith are null, void, and of no further effect.

11. Defendants shall furnish to the Court and to plaintiffs' attorneys a report on or before November 1, 1976, attesting to the accomplishment of the provisions of paragraphs 4-7, 9 and 10 of this Order, and shall file on or before February 1, 1977, a report attesting to the accomplishment of the provisions of paragraph 8 of this Order.

12. This Court shall retain continuing jurisdiction over this action.

ENTER:
ALFRED Y. KIRKLAND,
Judge, United States
District Court.

Dated: August 24, 1976

Name of Related Foster Parent .....

ADDRESS .....

.....

Dear M— ..... (Related Foster Parent)

At the time that your relative(s) (*name of ward(s)*) was (were) placed in your home as (a) foster child(ren), and subsequently, the State of Illinois limited the assistance it could give to foster parents, such as yourself, who were related to foster children living with them. In general, the amount of cash assistance paid in such cases could be no more than $63.00 monthly for each related foster child, which was less than the amount which would have been paid if the foster child were not related.

Recently, however, a federal court has ruled that such a limitation on cash payments is unlawful, and that foster children placed in a relative's approved foster home are entitled to full cash assistance and services, to the same extent as foster children living in homes with foster parents unrelated to them. This has included a foster cash benefit to the related foster parent of $105 monthly for each related child living with them, as well as medical insurance coverage of the child under the "Medicaid" program, and other supportive services.

Under the federal court's decision, the cash benefits paid for foster children living in homes provided by relatives (such as yourself) must be increased. Enclosed is a check for $——— (or, Under separate cover, you have been (or will be) mailed a check for $———). This amount represents the increased amount owing you and (*name of ward(s)*) under the federal court's decision, for the period of July 27, 1976, the date of that decision, to October 1, 1976. For all periods after October 1, 1976 (unless and until you are duly notified to the contrary) you will receive an increased monthly benefit check of not less than $——— for each related foster child whom you are caring for in your home.

If you have any questions about any matter discussed in this letter, please feel free to call or write (*name of designated DCFS representative, address and phone number.*)

Sincerely,

.....
(Name of DCFS representative)

EXHIBIT A

Name of Relative .....

Address .....

.....

AN IMPORTANT NOTICE CONCERNING
(*NAME OF WARD(S)*)

Dear *M—*. (*Relative*):

As you may be aware, your relative(s) (*Name of Ward(s)*) is (are) (a) ward(s) of the State of Illinois and currently live(s) in (a foster home with non-relatives) [or] (name of institution).

The State of Illinois is responsible for the selection of the best possible home for its wards, and strives to place each foster child in the best possible home, preferably that of an adult relative.

At the time (*Ward(s)*) was (were) placed in a foster home, and subsequently, the State limited the assistance it would give to relatives for providing a home to a related foster child to approximately $63 per child each month, or less. A federal court has ruled, however, that such a limitation is unlawful, and that children placed in a relative's approved foster home are entitled to full assistance and services to the same extent as foster children living in homes with foster parents unrelated to them. This includes a foster care cash benefit to the relative of $———/month for each child, as well as medical insurance coverage of the child through the "Medicaid" program, and full supportive services.

If you feel that the increase in money and services allows you to care for (*Ward(s)*) in your home, call or write (*DCFS Designated Representative, Address and Phone Number*) and indicate your wish to be considered as (his/her/their) foster parent(s). We will then inform you of how to go about being approved as a foster home.

If you are not able to be a foster parent but know of others related to (*Ward(s)*) who might be interested, please give them this notice or provide us with their names, addresses and telephone numbers.

The State regularly reviews its foster placements. Therefore, even if you are not interested in being (*Ward's(')*) foster parent now, but are interested in becoming a foster parent at some future time, do not hesitate to express your interest at that time to (*Designated DCFS Representative, Addresss and Phone Number*).

Sincerely,

.....

(Name of DCFS Representative)

EXHIBIT B

APPENDIX D

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 73-6935

Marcel Youakim et al., Appellants, v. Jerome Miller, Individually and as Director of the Department of Children and Family Services, et al.	On Appeal from the United States District Court for the Northern District of Illinois.

[March 31, 1976]

PER CURIAM.

As part of the federal Aid to Families with Dependent Children (AFDC) program, 42 U. S. C. § 601 *et seq.*, the State of Illinois provides federally subsidized foster care (AFDC-FC) payments of $105 per month for a dependent child placed with unrelated foster parents. Under Illinois' administration of the program no foster care payments are made to foster parents who are related to the foster child. Related foster parents are eligible, however, to receive payments under the State's regular AFDC program for the support of dependent children in the amount of $63 per month. These payments are made without regard to the financial circumstances of the family caring for the child. In addition, as an exception to the State's regular policy, related foster parents, upon an adequate showing of financial need, may receive supplemental payments for child care which bring the payments in connection with the related foster child to approximately $105 per month.

Appellants are Linda Youakim and her husband, Marcel, and Linda's four minor brothers and sisters, Timothy, Mary Lou, Larry and Sherry Robertson. Since 1972, the Youakims have been foster parents of Timothy and Mary Lou. Larry and Sherry have been living in separate, unrelated foster care facilities since 1969. Because Linda is related to Timothy and Mary Lou, the Youakims were ineligible for AFDC-FC foster care payments. They did apply for and receive the smaller AFDC payments for both children. Alleging injury resulting from financial inability to provide adequate care for Timothy and Mary Lou and to bring Larry and Sherry into their foster family, appellants filed suit in the District Court against the state officials on behalf of themselves and all other persons similarly situated. Their complaint described the suit as an action to enjoin enforcement of the foster care payment scheme on the ground that it denied related foster families the equal protection of the laws and likewise discriminated against wards of the State and relatives who could not provide an adequate foster home without full foster care payments. They asked that a three-judge District Court convene and enjoin the enforcement of the Illinois statutes and regulations.

The three-judge court "approved" the Rule 23(b)(2) class, granted appellees' motion for summary judgment, and ultimately held that the "Illinois scheme does not deny plaintiffs the equal protection of the laws." 374 F. Supp. 1204, 1210 (ND Ill. 1974). The jurisdictional statement filed here expressly challenged the Illinois scheme both on equal protection grounds and on the ground of conflict with the Social Security Act. We noted probable jurisdiction. 420 U.S. 970 (1975).

Although the jurisdictional statement as to which we noted probable jurisdiction presented the question of conflict between the Illinois law and the Social Security Act, it appears that the Supremacy Clause claim was not presented to the District Court as an independent ground for invalidating the state law. The complaint described the suit as one seeking an injunction on equal protection grounds. The sole ground for relief expressly claimed in each of the three causes of action which the complaint purported to allege, as well as in the prayer for relief, was that the Illinois program denied appellants equal protection of the laws. It does not appear from the record in the District Court that as the case developed appellants rested on the Supremacy Clause as a separate basis for their injunction claim. Nor did the District Court address the relationship between state and federal law independently of the equal protection issue.

Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *California* v. *Taylor*, 353 U.S. 553, 557 n. 2 (1957); *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16 (1958). But as *Pollard* v. *United States*, 352 U.S. 354, 359 (1957), and *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 412 (1947), for example, demonstrate, the rule is not inflexible. Cf. *Boynton* v. *Virginia*, 364 U.S. 454, 457 (1960). Its usual formulation is that "it is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). Here, as we shall describe, the circumstances justify our dealing with the issue of conflict between state and federal statute at least to the extent of vacating the judgment below and remanding the case for consideration of the claim that the Illinois foster care program is in conflict with the Social Security Act.

Initially, it should be noted that the statutory issue is not foreign to the subject matter of the complaint. Attacks on state welfare statutes often combine Equal Protection and Supremacy Clause issues. The latter question could surely have been pursued under the complaint filed in this case, which, as part of the "facts" incorporated by reference in each of the three carses of action, alleged that the Illinois program was in conflict with the policy of the United States expressed in Subchapter 4 of the Social Security Act, 42 U. S. C. §§ 601-625, specifically with the federal policy of encouraging the care of children in their own homes or in the homes of relatives wherever possible.

It is also apparent that the District Court was of the view that under *Townsend* v. *Swank*, 404 U.S. 282 (1971), "serious equal protection problems" might arise if "a State attempts to rely on the concept of fiscal integrity to limit beyond statutory standards the class eligible to receive federally subsidized payments." 374 F. Supp. at 1210. For this reason, the District Court compared federal and state law, and concluded that "far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it. . . . Thus the federal statute makes the same classification as the Illinois statutes." *Ibid.* Had appellants relied on the Supremacy Clause issue as a separate ground for decision it would appear that the claim would have been rejected by the District Court. In light of these circumstances, the case is at most only marginally subject to the rule that this Court will not consider issues "not pressed or passed upon" in the court below.

Beyond these considerations, on October 25, 1974, after the filing of the jurisdictional statement but before we

noted probable jurisdiction, the Department of Health, Education, and Welfare issued a "Program Instruction" stating that under the controlling federal law, "[w]hen a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified . . ., the foster care rate of payment prevails regardless of whether or not the foster care home is operated by a relative." Also, in response to appellants' jurisdictional statement, the Solicitor General filed a statement in this Court urging that the Illinois foster care program was inconsistent with the Social Security Act insofar as it provided lower payments to unrelated foster parents than to those who were related. Neither the appellants nor the District Court had the benefit of either of these developments when the case was in the lower court. The interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute. *New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 421 (1973); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 121 (1973); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971) and appellants[1] now wish to press the issue of conflict between the state and federal law. We think that it is appropriate to afford them the opportunity to do so, but that the claim should be aired first in the District Court. Vacating the judgment and remanding the case for this purpose will require the District Court first to decide the statutory issue, *Hagans* v. *Lavine*, 415 U.S. 528 (1974), and if appellants prevail on that question, it will be unnecessary for either the District Court or this Court to

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1. The appellee state officials have met both of appellants' claims on the merits and have not sought to restrict our review to the equal protection issue.

reach the equal protection issue at all. A remand is thus consistent with our usual practice of avoiding decisions on constitutional matters if a case may be resolved on other grounds.[2]

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2. From papers lodged with the Court, it appears, and appellants do not dispute, that since September 1, 1974, the Youakims have been receiving need-based payments supplementing the AFDC payments for Timothy and Mary Lou. They now receive monthly payments totaling $105, the same amount they would receive under the AFDC-FC program. Their receipt of these payments does not moot the case. The complaint alleged that ineligibility for regular foster care payments had precluded the Youakims "from even considering accepting for foster care the [two] other family members" who are living with nonrelatives in other foster care facilities. App. 12. Were it not for the Illinois program, they allege, the Youakims could seek to bring Larry and Sherry into their foster home and would receive the same monthly $105 AFDC-FC payments per child received as a matter of course by the foster care facilities now caring for Larry and Sherry without any showing of need and without applying for need-based funds supplementing the $63 AFDC payments. Whatever its strength, the Youakims' claim that it is unlawful to require them to demonstrate need and to rely on an exception to policy in order to receive the same child care payments is not mooted by current receipt of larger payments for Timothy and Mary Lou who are living in the Youakim home. Because we conclude that the case is not moot as to the Youakims, we need not decide whether the District Court properly identified the Rule 23(b)(2) class, compare *Sosna* v. *Iowa*, 419 U.S. 393 (1975), with *Indianapolis School Comm'rs* v. *Jacobs*, 420 U.S. 128 (1975), so that the class action might be maintained notwithstanding mootness as to the named plaintiffs, or whether appellant Linda Youakim properly sued as "next friend" of her four brothers and sisters, see Fed. Rule Civ. Proc. 17(c), so that their constitutional interests could be adjudicated by the court.

The action we take here is similar to the order the Court entered in *Thorpe* v. *Housing Authority of Durham*, 386 U.S. 670 (1967). There, rather than deciding the constitutionality of an eviction from a public housing project, the Court remanded the case for reconsideration in light of a supervening administrative directive which was issued by federal authorities and which it was thought might provide a nonconstitutional basis for decision. *Cf. Richardson* v. *Wright*, 405 U.S. 208, 209 (1972).

The judgment of the District Court is vacated and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DIVISION ILLINOIS,
EASTERN DISTRICT

Feb. 28, 1974

MARCEL YOUAKIM et al.,
Plaintiffs,

v.

JEROME MILLER Individually and as Director of the Department of Children and Family Services and the Department of Children and Family Services, of the State of Illinois,
Defendants.

No. 73 C 635

MEMORANDUM OF DECISION

TONE, District Judge.

This suit was commenced as a class action to enjoin the operation of the Illinois foster home program. Under that program foster parents who provide homes for children unrelated to them receive monthly foster care payments from the Department of Children and Family Services, but foster parents who provide homes for children related to them do not receive such payments. Because plaintiffs seek to enjoin the operation of a state statute, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284. Defendants have now moved to strike and dismiss.

The Illinois statutory scheme allocates federally subsidized payments to foster parents who care for children who are wards of the state. Section 5 of the Department of Children and Family Services Act, Ill. Rev. Stat., 1971, Ch. 23, § 5005, empowers the Department ("CFS") and its Director to

(a) establish rules and regulations concerning foster care;

(b) accept for care and placement in foster homes children adjudicated wards of the state; and

(c) make payments for the board, clothing, care, training and supervision of children placed in licensed foster homes.

Under the Department's eligibility criteria, eligibility for monthly payments, which now approximate $105 per child, depends upon the economic status of the home from which the child was removed, not on the wealth of the foster parents. By authorizing payments only to licensed homes, Section 5 denies eligibility to foster parents providing homes for children related to them, because those foster parents are exempt from licensing under the Child Care Act of 1969, Ill. Rev. Stat., 1971, Ch. 23, §§ 2212.05, 2212.17, and thus cannot be licensed.[1] Foster parents caring for related

1. The parties have directed their arguments primarily to the Illinois Department of Children and Family Services Manual at 95-97 as the authority for denying payments to related foster parents. This manual, however, merely states that "[t]he Department has no statutory authority to pay relatives for the care of children," and thus does no more than summarize what is apparent on the face of the statutes. For the purposes of this opinion, then, Ill. Rev. Stat., 1971, Ch. 23, §§ 2212.05, 2212.17, and 5005 will be considered as the challenged statutes.

children are eligible for Aid to Families with Dependent Children ("AFDC") payments under Ill. Rev. Stat., 1971, Ch. 23, §§ 4-1 to 4-11, but in order to receive these payments they must make a separate application to the Department of Public Aid, and more importantly, these monthly payments are only about $63.00 per child. In addition to the AFDC payments, some foster families in which the parents and children are related receive additional funds from the Social Service Administration up to the amount of the foster care payments, if the Department of Children and Family Services makes a determination of need. This exception to the general practice is explained only in the CFS placement manual, but according to an affidavit filed by an administrator of CFS, approximately 140 of the 1500 related foster families in the state now receive this extra allowance.

Plaintiffs are Marcel and Linda Youakim, husband and wife; Timothy and Mary Lou Robertson, the minor brother and sister of Linda Youakim who have been living with their foster parents the Youakims since 1972; and Larry and Sherry Robertson, the minor brother and sister of Linda Youakim who have been living in foster care facilities operated by persons unrelated to them since 1969. The Youakims allege that because they do not receive the full foster care payments, they suffer severe financial hardship in caring for Timothy and Mary Lou, and are financially unable to take in Larry and Sherry. On behalf of themselves and all other persons similarly situated, plaintiffs assert that the distinction between related and unrelated foster parents for the purpose of determining eligibility for foster care benefits denies them equal protection of the laws as guaranteed by the Fourteenth Amendment, and they ask that defendants, the Illinois Department of Family Services and its director, be enjoined from enforcing, applying or executing this program.

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, defendants have moved to strike and dismiss the complaint, asserting, in addition to an abstention ground which we do not reach, that

(1) the Court does not have jurisdiction over the subject matter;

(2) the action should not be maintained as a class action; and

(3) plaintiffs have failed to state a claim upon which relief may be granted.

Both sides having filed affidavits asserting facts outside the pleadings, we treat the motion as one for summary judgment, as we are authorized to do by the last sentence of Rule 12(b).

At the oral argument plaintiffs urged that an evidentiary hearing should be held. In the view we take of the case, if the evidence most favorable to plaintiffs' contentions is assumed, judgment must be entered for defendants. An evidentiary hearing is, therefore, unnecessary.

Jurisdiction.

Defendants argue that this Court lacks jurisdiction because the action is in effect against the State of Illinois and therefore is barred by the sovereign immunity provision of the Eleventh Amendment. This argument is without merit. Beginning with Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), it has been held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the state and thus is not prohibited by the Eleventh Amendment. This rationale has been consistently followed in numerous civil rights cases and other actions where the application or execution of state statutes has been enjoined, *cf.* Townsend v. Swank, 404 U.S. 282, 92 S. Ct. 502, 30 L.

Ed. 2d 448 (1972); Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), and has been applied to permit suits against state officials to test the constitutionality of statutes under which they are acting, Hill v. Wallace, 259 U.S. 44, 42 S. Ct. 453, 66 L. Ed. 822 (1922); Hammer v. Dagenhart, 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918). Indeed, under this rationale courts have assumed jurisdiction over many recent suits against state officials brought for the purpose of attacking social welfare schemes similar to the one here in question. *Cf., e. g.,* Gaither v. Sterrett, 346 F. Supp. 1095 (N.D. Ind. 1972); Jefferies v. Sugarman, 345 F. Supp. 172 (S.D.N.Y. 1972); Dimery v. Department of Social Services, 344 F. Supp. 1181 (S.D. Iowa 1972); Alexander v. Swank, 314 F. Supp. 1082 (N.D. Ill. 1970). The Court has jurisdiction to decide this case.

Class Action Issue.

Another preliminary question is the propriety of maintaining this action as a class action. If the requirements of Rule 23, F.R.Civ.P., are met, a court normally must approve a class action. Fujishima v. Board of Education, 460 F. 2d 1355, 1360 (7th Cir. 1972); but see Ihrke v. Northern States Power Co., 459 F. 2d 566, 572 (8th Cir. 1972). Defendants argue that the claims of the named plaintiffs are not typical because not all foster parents will be financially unable to care for children related to them if they do not receive payments from the state. This argument ignores the basis of plaintiffs' claims. Plaintiffs are not challenging a system where payments are made to some and denied to others on the basis of need, but a scheme whereby, irrespective of the individualized needs of the foster parents, payments are made to families where the foster parents and children are unrelated, but, as a

general rule, not to related foster families. The exception to the general policy allows payments to be related foster families in certain cases, but even in light of this, related foster parents as a class are treated differently than unrelated foster parents, because in order to qualify under this exception they must meet a certain level of need which the unrelated foster parents do not have to meet. Thus, the interests of the named plaintiffs are typical of the class and, the other requirements of Rule 23 also having been met, the class action will be approved.

Other Preliminary Matters.

Before proceeding to the merits, we must first dispose of several other matters. One of these is plaintiffs' motion to strike certain allegations of an affidavit in support of defendants' motion by Frank J. Kopecky, Chief Counsel for CFS. Plaintiffs first seek to strike reference to the exception to the scheme under attack whereby under certain circumstances related foster parents are given payments in an amount equal to those given to unrelated foster parents. This motion will be denied, for plaintiffs have not presented adequate grounds to strike these allegations, and plaintiffs themselves have filed affidavits which refer to the same exception. Next, plaintiffs seek to strike an allegation in the affidavit which refers to an administrative determination as the basis for the Department's policy of generally not paying related foster parents. This allegation will be stricken because of the affiant's failure to state specific facts from which we can determine his personal knowledge of this matter. Finally, plaintiffs seek to strike statements relating to the respective jurisdictions of the Department of Public Aid and the Department of Children and Family Services. Plaintiffs' motion in this respect will be denied, the affiant being capable of testifying as to these matters from his own personal knowledge.

The Merits.

We turn now to the equal protection question. A state statute dealing with social welfare need only be rationally based and free from invidious discrimination. Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). Since the statutes challenged here fall within the category governed by the *Dandridge* rule, their validity depends upon whether the distinction between related and unrelated foster parents is based on differences that are reasonably related to the legitimate purposes of the foster care program. Morey v. Doud, 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1953).

Plaintiffs argue that, by providing for state aid only to foster parents who are unrelated to the child and denying it to others, the state has breached its duty to provide equally for all dependent children and has in fact contributed to the breakup of family homes. They assert that since related foster parents have the same need for state subsidies to provide adequately for their foster children as do unrelated foster parents, there is no basis for the distinction. Although this statement of the state's duty may indeed be correct, plaintiffs have failed to recognize both the purpose for which the payments are made and the test to be employed in examining the classification of the statute. When a classification in a law such as this is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. Morey v. Doud, *supra*, 354 U.S. 457; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911).

At the time this statute was enacted, the Illinois General Assembly could reasonably have been concerned

about how to use available public funds to provide as many foster homes as possible. It could reasonably have set out to provide for allocation of the available funds in a manner designed to secure the maximum number of foster parents for children who would otherwise remain parentless. A reasonable method of achieving this goal would have been to provide for the distribution of funds only to persons who would otherwise have had no particular reason or incentive for becoming foster parents rather than allocating the funds to all persons who become foster parents and thereby reducing the amount received by each; and it is on this basis that the defendants assert the classification was made. Allegedly, the state perceived a moral obligation on behalf of related foster parents to care for their related children which could not or would not be deepened by providing them a pro rata portion of the available funds. Therefore, according to the defendants, the state decided that the money which could have been allotted to related foster parents would be better used as added inducement to unrelated persons.

This classification, the wisdom of which is not for us to determine, bears a rationale relationship to the legitimate purpose of attempting to assure that foster homes are made available. Some related foster parents may not be able to afford the responsibility of caring for additional children,[2] but the state argues that the scheme was not enacted to alleviate this problem, and from the fact that payments are not based on the relative wealth of the foster parents, this contention is borne out. In this respect, the case at bar differs from United States Department of

2. Of course, this possibility is lessened by the fact that AFDC payments are generally available.

Agriculture v. Moreno, 413 U.S. 528, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973), a case in which the Supreme Court held unconstitutional a statutory scheme which excluded from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household. The critical point of that decision, and the basis upon which it is distinguishable from the case at bar, is that the purpose of the food stamp program was to alleviate hunger, and that to fulfill this purpose it had to be administered on the basis of need rather than on the basis of the relationships of the people constituting one economic unit and sharing cooking facilities.

More analogous to the case at bar is Ramos v. Montgomery, 313 F. Supp. 1179 (S.D. Cal. 1970), aff'd, 400 U.S. 1003, 91 S. Ct. 572, 27 L. Ed. 2d 618 (1971), a case involving a challenge to a California scheme under which AFDC payments made to natural parents were substantially less than payments made to foster parents. The Court in that case recognized that maintenance of the family structure was an important consideration in any child welfare program and that some natural parents were financially unable to provide suitable homes for their children, but nevertheless upheld the classification on the ground that the overriding purpose of the statute was the overall interest of the public in the protection of children[3] and that this purpose was

3. Among the stated purposes for which child welfare services are authorized under the Illinois Department of Children and Family Services Act are "protecting and caring for homeless dependent or neglected children"; "protecting and promoting the welfare of children, including the strengthening of their own families and counseling of family members"; and "providing adquate care of children away from their homes, where needed, in foster family homes." Ill. Rev. Stat., 1971, Ch. 23, § 5005. On the basis

reasonably served by a plan which was motivated to provide as many foster homes as possible.[4] The *Ramos* case is factually distinguishable from the case at bar, but the reasoning of the court is applicable here. A natural parent's responsibility to its child may stem from a legal duty, whereas a related foster parent's duty is moral, but in either case the result will generally be the same: the parent or relative is likely to care for the child. It is thus reasonable in either case for the state to adopt a program designed to induce families who would not otherwise become foster parents to assume that role.

The challenged classification will cause some children to be separated from their relatives for financial reasons. The state may reasonably have concluded, however, that the greater good of the greater number of children in need of foster homes is served by the classification which has been made. It may have concluded that if the classification were not made, the state's foster homes program would be jeopardized. As the class eligible to receive payments is

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4. Another basis for the decision in *Ramos* was that it was reasonable to expect that foster parents would incur expenses in meeting state licensing requirements which natural parents would not. Whether this rationale is also applicable to the case at bar is difficult to determine, for although relatives are not subject to licensing, they are kept under close scrutiny by CFS. In any event, it is not necessary for us to resolve this question.

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of this language, it can be inferred that, as in *Ramos*, although strengthening of the family unit is an important concern of the Act, the primary purpose of the Act is the protection and care of children generally.

made more inclusive, the individual payments become smaller. The possibility exists that if related persons are added to the eligible class, the individual payments would be reduced to an amount insufficient to induce qualified unrelated persons to provide foster homes for dependent children. Thus, the purpose of the payments would not be served, and either the fiscal integrity of the program would be impaired or the standards for approval of unrelated persons might have to be compromised.[5]

There is language in Townsend v. Swank, *supra*, 404 U.S. at 291, that serious equal protections problems may arise when a state attempts to rely on the concept of fiscal integrity to limit beyond federal statutory standards the class eligible to receive federally subsidized payments, but

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5. A consideration of the consequences of eliminating the classification which plaintiffs challenge will identify another rational basis for it. The payments which are the subject of this litigation are intended to subsidize care for children who have been adjudicated wards of the state. It is manifest that there are many children in Illinois whose natural parents are deceased but who, without being adjudicated wards of the state, are cared for by relatives who are their legal custodians, guardians, or perhaps even adoptive parents. Certainly the state has an interest in encouraging its citizens to care for related minors who have been orphaned by the death of their parents, either by adopting them, accepting the responsibilities of guardianship, or even merely taking informal custody of such minor children without having them adjudicated wards of the state. If the plaintiffs' attack on the Illinois program were sustained, relatives would have a financial inducement to cause orphaned children to be adjudicated wards of the state in order to qualify themselves for foster care payments. The state may rationally conclude that such a financial motivation would contravene the policy of the laws relating to adoption and guardianship.

plaintiffs' argument that that dictum invalidates the Illinois program in question here is of no avail. The regulations interpreting the Federal Social Security Act gives the states "substantial latitude and corresponding responsibility for determininag the coverage, nature, and scope of their public assistance programs," and limits this authority only to the extent that "the groups selected for inclusion in the plan . . . must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." 45 C.F.R. § 233.10. Far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it.[6] The federal statute authorizes aid to the natural parents and relatives of dependent children in one section, 42 U.S.C. § 606, and aid to foster parents in another, 42 U.S.C. § 608. Additionally, more money is allocated under the federal plan to foster care payments than to regular AFDC payments. 42 U.S.C. § 603(a)(1)(B); see Ramos v. Montgomery, *supra* 313 F. Supp. at 1182. Thus the federal statute makes the same classification as the Illinois statute.

The Illinois scheme does not deny plaintiffs equal protection of the laws. Summary judgment is entered in favor of defendants.

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6. Plaintiffs argue that the "exception to policy" under which some related foster parents receive additional allotments on the basis of need makes the state scheme unlike the federal. This is a variation, which the federal regulations explicitly allow, 45 C.F.R. § 233.10, but the two schemes are nevertheless parallel.

APPENDIX F

APPENDIX F

No. 76-1884

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellees,

vs.

JEROME MILLER, individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES OF THE STATE OF ILLINOIS,

Defendants-Appellants.

Dist. Court No. 73 C 635

NOTICE OF FILING AND PROOF OF SERVICE OF NOTICE OF APPEAL

TO: KENNETH KANDARAS
John Marshall Law School
315 South Plymouth Court
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YOU ARE HEREBY NOTIFIED that on November 3, 1977, we filed on behalf of Defendants-Appellants, the attached Notice of Appeal. A copy of said Notice of Appeal and a copy of the Notice of Filing and Proof of Service of Notice of Appeal is herewith served upon you.

WILLIAM J. SCOTT
Attorney General
State of Illinois
Attorney for Defendants-Appellants.
By: /s/ PAUL J. BARGIEL
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STATE OF ILLINOIS }
COUNTY OF COOK }
SS

MARIE L. SULLIVAN, being first duly sworn, states that she served a copy of the above Notice of Filing and Proof of Service of Notice of Appeal and attached Notice of Appeal upon the attorneys of record at the addresses listed above, by mailing same, postpaid, in an envelope, properly addressed and mailed this 3rd day of November, 1977.

MARIE L. SULLIVAN

SUBSCRIBED AND SWORN to
before me this 3rd day
of November, 1977.
MAUREEN McMAHON

NOTARY PUBLIC

No. 76-1884

IN THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

MARCEL YOUAKIM and LINDA YOUAKIM, individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

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Defendants-Appellants.

Dist. Court No.
73 C 635

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that JEROME MILLER, et al., Appellants named above, by their Attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois, hereby Appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Seventh Circuit entered on September 27, 1977, which affirmed the decisions of the district court entered on July 27 and August 24, 1976.

This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

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